89- 1456

Supreme Court, U.S.
FILED
MAR 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., AND THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH AND DENISE NIEDRICH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PAUL VICTOR ESPOSITO
135 South LaSalle Street
Suite 1000
Chicago, Illinois 60603-4274
(312) 580-1250

Counsel for Petitioners.

March 16, 1990

QUESTION PRESENTED

Whether a controlling officer or shareholder may be held personally liable under ERISA for a corporation's delinquent contributions to a multiemployer benefit plan where neither the corporate veil can be pierced nor an alter ego established.

LIST OF PARTIES

All parties to the proceeding in the court of appeals are listed in the caption of this Petition.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

The Decision Raises An Important Question Regarding The Funding Of Multiemployer Benefit Plans Under ERISA 5

A. Nature and Scope of the Problem 5

B. The Meaning of § 515 7

C. The Substantial Disagreement Among the Courts 9

D. The Decision Below Frustrates ERISA's Purpose 13

E. The Consequences of the Decision Below 16

CONCLUSION 18

APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit rendered on December 19, 1989 ..... 1a

Judgment of the United States Court of Appeals, for the Seventh Circuit rendered on December 19, 1989 .. 1b

Memorandum Decision of the United States District Court for the Northern District of Illinois rendered on December 5, 1988 ..... 1c

Opinion Letter No. 82-38 of the General Counsel of The Pension Benefit Guaranty Corporation (December 14, 1982) 1d

TABLE OF AUTHORITIES

CASES: Page

Alman v. *Danin*, 801 F.2d 1 (1st Cir. 1986) ... 14

Alman v. *George Manufacturing Co.*, 680 F. Supp. 56 (D. Mass. 1988) 10

Alman v. *Servall Manufacturing Co.*, 6 Empl. Ben. Cas. (BNA) 2031 (D. Mass. 1984) 9,10

Building Trades United Pension Trust Fund v. *Peters*, [WESTLAW 1987 WL 29330] (E.D. Wis. 1987) 10

Combs v. *Indyk*, 554 F. Supp. 573 (W.D. Pa. 1982) 10

Donovan v. *Agnew*, 712 F.2d 1509 (1st Cir. 1983) 9

Elam v. *Seng Truck Leasing Co.*, [WESTLAW 1988 WL 139280] (E.D. Ill. 1988) 10

Falk v. *Brennan*, 414 U.S. 190 (1987) 9

Firestone Tire & Rubber Co. v. *Bruch*, — U.S. — , 109 S.Ct. 948 (1989) 16

First National City Bank v. *Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983) 14

Gambino v. *Index Sales Corp.*, 673 F. Supp. 1450 (N.D. Ill. 1987) 10

Glover v. *Hartmann Freight Lines, Inc.*, [WESTLAW 1988 WL 98808] (N.D. Ill. 1988) 10

International Brotherhood of Painters and Allied Trades Union v. *George A. Kracher, Inc.*, 856 F.2d 1546 (D.C. Cir. 1988) 11

Kwatcher v. *Massachusetts Service Employees' Pension Fund*, 879 F.2d 957 (1st Cir. 1989) 8,11

Table of Authorities Continued

Page

Laborers Health and Welfare Trust Fund for Northern California v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, (1988) 14,16

Laborers' Pension Fund v. *Bakke Construction Co.*, [WESTLAW 1987 WL 19818] (N.D. Ill. 1987) 10

Leddy v. *Standard Drywall, Inc.*, 875 F.2d 383 (2nd Cir. 1989) 12

Levit v. *Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989) 4,8,9,11

Lowen v. *Tower Asset Management, Inc.*, 829 F.2d 1209 (2nd Cir. 1987) 14

Mason Tenders District Council Welfare Fund v. *Dalton*, 648 F. Supp. 1309 (S.D. N.Y. 1986) (vacated at parties' request) 10

Massachusetts Laborers' Health & Welfare Fund v. *Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988) 8,9,11

Massachusetts State Carpenters Pension Fund v. *Atlantic Diving Co.*, 635 F. Supp. 9 (D. Mass. 1984) 9

Operating Engineers Pension Trust v. *Reed*, 726 F.2d 513 (9th Cir. 1984) 10

Pension Benefit Guaranty Corp. v. *R. A. Gray & Co.*, 467 U.S. 717 (1984) 6

Plumbers' Pension Fund Local 130, U.A. v. *Niedrich*, 701 F. Supp. 651 (N.D. Ill. 1988) 2

Plumbers' Pension Fund Local 130, U.A. v. *Niedrich*, 891 F.2d 1297 (7th Cir. 1989) .. 1

Rockney v. *Blohorn*, 877 F.2d 637 (8th Cir. 1989) 10,12

Rubenstein v. *Tri-State Transport, Inc.*, 646 F. Supp. 1 (D. Mass. 1984) 9

Table of Authorities Continued

Page

Rutherford Food Corp. v. *McComb*, 331 U.S. 722 (1947) 8

Scarbrough v. *Perez, Inc.*, 870 F.2d 1079 (6th Cir. 1989) 11

Serembus v. *Comfort Lines, Inc.*, 689 F. Supp. 1496 (N.D. Ill. 1988) 8,10

Solomon v. *Klein*, 770 F.2d 352 (3d Cir. 1985) 11

Solomon v. *Laranne Sportswear Corp.*, 648 F. Supp. 407 (E.D. N.Y. 1987) 10

Solomon v. *R.E.K. Dress, Inc.*, 670 F. Supp. 96 (S.D. N.Y. 1987) 10

Trustees of Iron Workers' Local 473 Pension Trust v. *Allied Products Corp.*, 872 F.2d 208 (7th Cir. 1989)..... 16

Upholsterer's International Union Health and Welfare Fund Trustees v. *Pontiac Furniture, Inc.*, 647 F. Supp. 1053 (C.D. Ill. 1986) 10

Walling v. *Portland Terminal Co.*, 330 U.S. 148 (1947) 8

West Virginia-Ohio Valley Area IBEW Welfare Fund v. *Ball Electric Co.*, 685 F. Supp. 953 (S.D. W.Va. 1988) 10

Table of Authorities Continued

Page

STATUTES:

28 U.S.C. § 1254(1) 2

29 U.S.C. § 185 2

29 U.S.C. § 203(a) 8

29 U.S.C. § 203(d) 8

29 U.S.C. § 1001(a) 5

29 U.S.C. § 1001(c) 6

29 U.S.C. § 1002(5) 8,14

29 U.S.C. § 1002(9) 8

29 U.S.C. § 1132(e)(1) 2

29 U.S.C. § 1132(g)(2) 7,16

29 U.S.C. § 1145 2,3,6,7,13,14,16

29 U.S.C. § 1303(e) 16

MISCELLANEOUS:

Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong. 2nd Sess. Legislative History of the Retirement Income Security Act of 1974 9,16

Senate Comm. on Labor and Human Resources, 96th Cong., 2nd Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration (Comm. Print 1980) 6,7,13,16

126 Cong. Rec. (1980) 15

Opinion Letter No. 82-38 of the General Counsel of the Pension Benefit Guaranty Corporation (December 14, 1982) 15

Pension Benefit Guaranty Corporation, News Release (May 2, 1989) 7

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., AND THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH AND DENISE NIEDRICH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Plumbers' Pension Fund, Local 130, U.A., Plumbers' Welfare Fund, Local 130, U.A., and The Trust Fund for Apprentice and Journeyman Education and Training, Local 130, U.A., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on December 19, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 891 F.2d 1297 and is reprinted in the Appendix at 1a, *infra*.

The Memorandum Decision of the United States District Court for the Northern District of Illinois (Duff, D. J.) is reported at 701 F. Supp. 651 and is reprinted in the Appendix at 1c, *infra.*

JURISDICTION

Petitioners brought suit in the United States District Court for the Northern District of Illinois. They invoked federal jurisdiction pursuant to §§ 502(e)(1) and 515 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1132(e)(1) and 1145, and § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185. On December 5, 1988, the court granted respondents' motion to dismiss the complaint for failure to state a claim upon which relief may be granted (1c).

On December 19, 1989, the court of appeals entered a judgment and an opinion affirming the district court's order (1a). No petition for rehearing was sought.

The time for filing this petition for a writ of certiorari has not been extended.

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1145. Delinquent contributions.

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

STATEMENT OF THE CASE

This proceeding arises out of the dismissal of petitioners' complaint for failure to state a claim upon which relief may be granted.

Petitioners are three multiemployer benefit plans (R.1 at 2). They filed a complaint against respondents, the president and secretary of Rob Roy Plumbing, Inc. (Rob Roy), an Illinois corporation (R.1 at 2, 4, 5). Rob Roy is not a party to this case.

Pursuant to collective bargaining agreements, Rob Roy agreed to make benefit contributions to petitioners (R.1 at 3). When Rob Roy failed to contribute, arbitration was held and petitioners were awarded $24,020.11 (R.1 at 3-4). After Rob Roy failed to pay the award, petitioners brought an action in district court to enforce the award, and on August 12, 1985, judgment was entered against Rob Roy for the amount then due (R.1 at 4). Rob Roy was dissolved by the Illinois Secretary of State prior to satisfying the judgment (R.1 at 4).

On August 12, 1988, petitioners brought this action against respondents individually pursuant to the Employee Retirement Income Security Act (ERISA) to collect the delinquent contributions (R.1). Petitioners' suit was based on § 515 of ERISA, which states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145; (R.1 at 2). Petitioners alleged that each respondent exercised control over Rob Roy in matters pertaining to labor relations and employee benefits and, therefore, each was an "employer" for purposes of liability

under § 515 (R.1 at 4, 5). Petitioners did not allege any facts in support of the piercing the corporate veil or alter ego theories.

Pursuant to respondents' motion, the district court dismissed petitioners' complaint (R.16; 1c). The court recognized that the definition of "employer" under ERISA is broad enough to include individuals (6c-7c). However, it ruled that the word "obligated" in § 515 limited the scope of the definition of "employer" for purposes of determining personal liability (7c-9c). The court held that:

> . . . unless there are grounds to pierce the corporate veil or the corporation is the alter ego of the controlling individual, that individual is not liable under § 1145 [§ 515] unless he or she is a party to the plan or collective bargaining agreement.

(9c)

The court of appeals affirmed this decision (1a). The court heavily relied on its recent decision in *Levit* v. *Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989). In *Levit*, the seventh circuit had recognized that the ERISA definition of "employer" was derived from the virtually identical definition contained in the Fair Labor Standards Act (FLSA), and that under the FLSA, a controlling corporate officer or owner may be held personally liable for the failure to pay the minimum wage. *Id.* at 1193. However, the court below reaffirmed its position in *Levit* that unless an employer is "obligated to make contributions" to a multiemployer plan pursuant to the plan or a collective bargaining agreement, it cannot be personally liable under ERISA absent facts warranting the piercing of the corporate veil or the establishment of an alter ego (7a-8a).

The court also relied on an opinion letter of the general counsel of the Pension Benefit Guaranty Corporation (PBGC) regarding withdrawal liability (8a-9a). The court concluded that an officer or owner could only be held liable

for the contributions if he is liable for general corporate debts under state corporate law (9a, 10a).

REASONS FOR GRANTING THE WRIT

The Decision Below Raises An Important Question Regarding The Funding Of Multiemployer Benefit Plans Under ERISA.

The issue here is fundamental to the success of private multiemployer benefit plans. It has never been presented to this Court. The issue is whether a corporate officer or shareholder who controls decisions regarding contributions to plans may be held personally liable under ERISA for a corporation's delinquencies even though the corporate veil cannot be pierced nor an alter ego established. The lower courts have struggled with this issue, and their opinions reflect a divergence of thought and results. In rejecting personal liability, the seventh circuit misinterpreted ERISA, and by allowing corporate formalities to control over the realities of the workplace, its decision frustrates a central design of ERISA—benefit security through the maintenance and growth of plan funds. If left unchecked, the decision will reduce available benefits to millions of workers and plan beneficiaries. It will force solvent corporate employers to either incur greater *pro rata* costs or withdraw from the plans. It will increase the burden on the PBGC and, ultimately, the taxpayers, to stand behind the broken promises of others. The decision will erode the integrity of the private multiemployer benefit system. Supreme Court review is immediately needed.

A.

Nature and Scope of the Problem

An essential purpose of ERISA is the correction of funding inadequacies in private benefit plans. 29 U.S.C.

§ 1001(a). This correction is crucial to ERISA's ultimate goal, the protection of the interests or workers and their families in promised benefits. 29 U.S.C. § 1001(c); see *Pension Benefit Guaranty Corp.* v. *Gray & Co.*, 467 U.S. 717, 720 (1984).

In the context of multiemployer plans, ERISA's goal has been seriously undermined by delinquencies in employer contributions. This problem has a widespread impact:

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers will honor their obligation to contribute in a timely fashion, bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.

Senate Comm. on Labor and Human Resources, 96 Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980; Summary and Analysis of Consideration, 43-44 (Comm. Print 1980). In part, Congress enacted the Multiemployer Pension Plan Amendmends Act (MPPAA) to combat this problem. Section 515 of ERISA, added by MPPAA and at issue here, states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the

> terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145. To enforce this obligation, MPPAA further amended ERISA by creating a cause of action against the employer for the delinquent contributions and other relief. 29 U.S.C. § 1132(g)(2).

This case raises a basic but important question—in the corporate setting, who is included as an "employer" under § 515. Certainly, a corporation is an employer. This case asks whether corporate decision-makers, individuals who cause the corporation to break promises to contribute to plans, are also employers. It pits corporate formality against workplace reality, with the benefit security of millions at stake. Presently, there are approximately 2,300 multiemployer pension plans nationally which serve about 8,300,000 participants, not counting beneficiaries. PBGC, News Release (May 2, 1989). These figures do not reflect the vast number of multiemployer welfare plans, defined contribution plans, and their additional beneficiaries. Thousands of corporate employers contribute to these plans. The decisions to not properly fund plans are made by their controlling officers or shareholders. This case will touch far more than the parties here, and it will have an enormous impact on the way corporate employers fund multiemployer benefit plans.

B.

The Meaning of § 515

Neither the language of § 515 nor its legislative history expressly states that courts should disregard corporate formalities and impose personal liability on controlling shareholders or officers. However, ERISA mandates that result.

ERISA's definition of "employer," a term used in § 515, is critical to determining the Congressional intent:

> The term "employer" means *any person* acting directly as the employer, *or indirectly in the interest of an employer*, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5) (emphasis applied). ERISA also defines the term "person" as:

> . . . an *individual*, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

29 U.S.C. § 1002(9) (emphasis supplied). These definitions are extremely broad. Even an entity outside the corporate structure such as a management association which administers a corporation's obligations to a multiemployer plan may be deemed an "employer." 29 U.S.C. § 1002(5). A controlling officer or shareholder acting for a corporation regarding multiemployer plan funding just as easily fits within the definition of "employer."

The ERISA definitions of "person" and "employer" are virtually identical to the Fair Labor Standards Act (FLSA) definitions, [29 U.S.C. § 203(a) and (d)]. In fact, ERISA's definition of "employer" is derived from FLSA. *Levit* v. *Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1193 (7th Cir. 1989); *Massachusetts Laborers' Health and Welfare Fund* v. *Starrett Paving Corp.*, 845 F.2d 23, 25 (1st Cir. 1988); *Kwatcher* v. *Massachusetts Service Employees' Pension Fund*, 879 F.2d 957, 959-60 (1st Cir. 1989). This Court has long recognized the breadth of the employer-employee relationship under the FLSA. *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947); *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729 (1947). Like ERISA, neither FLSA's language nor legislative history expressly mandates

the disregard of the corporate form. Yet, relying on the broad definition of "employer", this Court has held that under FLSA, even a management service retained by a building owner may be deemed the employer of the owner's employees. *Falk* v. *Brennan,* 414 U.S. 190, 195 (1974). The circuits have recognized that FLSA is broad enough to impose personal liability on a corporate officer with operational control of a covered enterprise. *Levit* v. *Ingersoll Rand Financial Corp.,* 874 F.2d 1186, 1193 (7th Cir. 1989); *Donovan* v. *Agnew,* 712 F.2d 1509, 1511 (1st Cir. 1983).

Notably, FLSA and ERISA have a similar design—the guarantee of income actually earned by workers. *Massachusetts Laborers' Health and Welfare Fund* v. *Starrett Paving Corp.,* 845 F.2d 23, 25 (1st Cir. 1988); see, 2 Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Retirement Income Security Act of 1974, 3374 (remarks of Rep. Madden) (hereinafter Leg. Hist.). Given the substantial identity of the language and purpose of FLSA and ERISA, the statutory interpretation of FLSA is equally applicable to ERISA.

C.

The Substantial Disagreement Among the Courts

The issue here is "difficult". *Massachusetts Laborers' Health and Welfare Fund* v. *Starrett Paving Corp.,* 845 F.2d 23, 27 (1st Cir. 1988). The lower courts have sharply disagreed on it. Recognizing the plain language of ERISA and its strong analogy to FLSA, at least six district courts imposed or recognized the personal liability of controlling officers and shareholders. *Massachusetts State Carpenters Pension Fund* v. *Atlantic Diving Co.,* 635 F. Supp. 9, 12-14 (D. Mass. 1984); *Rubenstein* v. *Tri-State Transport, Inc.,* 646 F. Supp. 1, 2-3 (D. Mass. 1984); *Alman* v. *Servall*

Manufacturing Co., 6 Empl. Ben Cas. (BNA) 2031 (D. Mass. 1984); *Upholsterer's International Union Health and Welfare Fund Trustees* v. *Pontiac Furniture, Inc.*, 647 F. Supp. 1053, 1054-55 (C.D. Ill. 1986); *Gambino* v. *Index Sales Corp.*, 673 F. Supp. 1450, 1452-57 (N.D. Ill. 1987); *Building Trades United Pension Trust Fund* v. *Peters*, [WESTLAW 1987 WL 29330] (E.D. Wis. 1987); *Laborers' Pension Fund* v. *Bakke Construction Co.*, [WESTLAW 1987 WL 19818] (N.D. Ill. 1987); *West Virginia-Ohio Valley Area IBEW Welfare Fund* v. *Ball Electric Co.*, 685 F. Supp. 953, 955 (S.D. W.Va. 1988); *Serembus* v. *Comfort Lines, Inc.*, 689 F. Supp. 1496, 1497-98 (N.D. Ill. 1988); *Glover* v. *Hartmann Freight Lines, Inc.*, [WESTLAW 1988 WL 98808] (N.D. Ill. 1988); *Elam* v. *Seng Truck Leasing Co.*, [WESTLAW 1988 WL 139280] (N.D. Ill. 1988); see also *Rockney* v. *Blohorn*, 877 F.2d 637, 641 (8th Cir. 1989), citing the unpublished decision of the District Court of Minnesota which recognized the personal liability of controlling corporate owners and managers.

The circuits which have considered the issue have rejected personal liability.[1] The circuit decisions reflect a diversity, and even conflict, in reasoning which demonstrates the circuits' struggle with the issue. In *Operating Engineers' Pension Trust* v. *Reed*, 726 F.2d 513, 515 (9th Cir. 1984), the court rejected personal liability without discussing § 515 or the definition of "employer". Arguably, *Reed* does not address the issue. See *Rockney* v. *Blohorn*, 877 F.2d 637,

---

[1] A number of district decisions have rejected personal liability. E.g., *Combs* v. *Indyk*, 554 F. Supp. 573, 575 (W.D. Pa. 1982); *Mason Tenders District Counsel Welfare Fund* v. *Dalton*, 648 F. Supp. 1309, 1311-18 (S.D. N.Y. 1986) (vacated at parties' request); *Solomon* v. *Laranne Sportswear Corp.*, 648 F. Supp. 407, 408-09 (E.D. N.Y. 1987); *Solomon* v. *R.E.K. Dress, Inc.*, 670 F. Supp. 96, 98-99 (S.D. N.Y. 1987); *Alman* v. *George Manufacturing Co.*, 680 F. Supp. 56, 57-58 (D. Mass. 1988).

641 (8th Cir. 1989). The third circuit has held that a corporate officer is not a "person" under ERISA and, therefore, cannot be an "employer". *Solomon* v. *Klein,* 770 F.2d 352, 354 (3d Cir. 1985). The first circuit has rejected the third circuit's rationale and has ruled that a controlling officer or shareholder may be an employer under ERISA. *Massachusetts Labors' Health and Welfare Fund* v. *Starrett Paving Corp.,* 845 F.2d 23, 24-25 (1st Cir. 1988); *Kwatcher* v. *Massachusetts Service Employees' Pension Fund,* 879 F.2d 957, 960 (1st Cir. 1989). However, the first circuit has concluded that unless contractually bound, a controlling shareholder or officer is not "obligated" to contribute and, therefore, may not be liable as an "employer" under § 515. *Starrett Paving Corp., supra,* at 25.

The D.C. circuit in *International Brotherhood of Painters* v. *George A. Kracher, Inc.,* 856 F.2d 1546 (1988), ruled that the definitions of "employer" and "person" did not aid in establishing personal liability because a corporate official neither acts directly for an employer nor indirectly in its interests. *Id.* at 1548. Unlike the first circuit, it found significant differences between ERISA and FLSA, and the court found no intent to incorporate FLSA case law into ERISA. *Id.* at 1548-49. The court ruled that in the absence of an express intent to disregard the rule of limited liability, § 515 only imposed liability on the corporate employer. The court was concerned that a contrary rule would discourage employer participation. *Id.* at 1550. In *Scarbrough* v. *Perez,* 870 F.2d 1079 (6th Cir. 1987), the sixth circuit recognized the divergent views of the first circuit and the third and D.C. circuits but did not choose between them.

Shortly before rendering the decision below, the seventh circuit rejected personal liability in *Levit* v. *Ingersoll Rand Financial Corp.,* 874 F.2d 1186 (7th Cir. 1989). The court recognized ERISA's reliance on the FLSA definition of

"employer." *Id.* at 1193. However, it stated that under § 515, only the employer contractually obligated to make contributions by virtue of a plan or collective bargaining agreement may be liable. The court also relied on an opinion letter of PBGC's General Counsel regarding withdrawal liability under Title IV of ERISA. The seventh circuit concluded that an officer may be personally liable only if he is liable for general corporate debts under state corporate law. Shortly after *Levit*, the eighth circuit decided *Rockney* v. *Blohorn*, 877 F.2d 637 (8th Cir. 1989), which essentially followed the D.C. circuit approach.

The decision below is the final case in this line. The seventh circuit simply followed *Levit* without additional analysis.

Even at the circuit level, there has been a recognition of personal liability under ERISA. Although the second circuit has not reached the precise issue presented here, it has held that a controlling officer who defrauds a benefit fund may be held personally liable under ERISA even if the corporate veil cannot be pierced. *Leddy* v. *Standard Drywall, Inc.*, 875 F.2d 383, 388 (2d Cir. 1989). It stated that a contrary ruling would defeat ERISA's purposes of promoting plans and protecting contractually defined benefits. *Id.* Additionally, in *Rockney* v. *Blohorn*, 877 F.2d 637 (8th Cir. 1989), the dissent reasoned that the rejection of personal liability for a controlling officer or owner is inconsistent with ERISA's purpose. *Id.* at 644 n. 1 (Heaney, S. J., dissenting).

The circuits have amply expounded their views. Their inconsistent reasoning illustrates their confusion, and district courts not bound by circuit decisions have recognized individual liability. This divergence demonstrates the need for Supreme Court review.

D.

The Decision Below Frustrates ERISA's Purpose.

In rejecting personal liability, the seventh circuit focused on § 515's language, "obligated to make contributions" to a multiemployer plan. The court reasoned that only a party to a plan or collective bargaining agreement is obligated to make the contributions and, therefore, a controlling officer or shareholder may not be held liable. The court misconstrued both the design and purpose of ERISA.

The phrase "obligated to make contributions" must be viewed in its proper context. Through MPPAA generally, and § 515 specifically, Congress sought to resolve the problems of delinquent contributions to *multiemployer* plans. E.g., Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 43, 44 (Comm. Print 1980). MPPAA did not concern single-employer plans. On the other hand, since its inception, ERISA has covered both single and multiemployer plans. Since MPPAA is an amendments act incorporated into the broader ERISA statute, Congress needed to limit MPPAA's language to multiemployer plans. To properly limit the focus of § 515, Congress inserted the entire phrase, "who is obligated to make contributions to a *multiemployer plan* under the terms of the plan or under the terms of a collectively bargained agreement . . ." 29 U.S.C. § 1145 (emphasis added). The phrase was not designed to limit applicable employers—only applicable benefit plans.

Moreover, the court's reliance on the phrase, "obligated to make contributions" misses the workplace reality which ERISA itself recognizes. A corporation is not self-effectuating. It cannot meet its contractual obligations to plans or other creditors without the active involvement of its manag-

ers. Certainly, in directing payment to a multiemployer plan, a corporate agent acts "indirectly in the interest of [the] employer" in relation to the plan. 29 U.S.C. § 1002(5). By the same token, when an officer diverts available contributions to other creditors or himself, or allows employees to work when the corporation cannot make contributions, the officer also acts "indirectly in the interest of [the] employer" in relation to the plan. 29 U.S.C. § 1002(5). Through ERISA's definition, for purposes of enforcing contractual plan obligations so vital to the maintenance and growth of plans, both the corporation and its controlling personnel are the "employer".

Properly understood, § 515 merely requires that the obligation to contribute must arise out of a contract. See *Laborers' Health and Welfare Trust Fund for Northern California* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 550 n. 16 (1988) [Section 515 "provides only for a contractual *origin* for delinquency liability" (emphasis supplied)]. However, once the obligation arises, the employer, as broadly defined by ERISA, must make the required contributions or be liable for a breach. Critically, in enacting MPPAA, Congress did not change the definition of "employer" in any way. 126 Cong. Rec. 23,287 (1980) (remarks of Sen. Williams). Unfortunately, by excluding controlling corporate officers or shareholders from § 515's reach, the decision below frustrates the Congressional intent to achieve full contractual compliance.

This Court has recognized that the formalities of corporate ownership may not be employed to defeat legislative policies. *First National City Bank* v. *Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629-30 (1983). This rule has been applied in ERISA cases. *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-21 (2d Cir. 1987); *Alman* v. *Danin*, 801 F.2d 1, 3-4 (1st Cir. 1986).

ERISA is not a corporate law statute. It is pension reform legislation designed to protect benefits for eligible participants and dependents. The attainment of ERISA's goal of benefit security depends upon plan solvency and growth, which requires full and timely contributions. 126 Cong. Rec. 11,991 (1980) (remarks of Rep. Thompson); 126 Cong. Rec. 20,178 (1980) (remarks of Sen. Javits). Congress recognized that corporate promises are often made and broken by controlling owners or managers who effectively personify the corporation. ERISA manifests the national will that those individuals may not defeat vested employee rights by raising, even in good faith, the cloak of limited liability. Contrary to ERISA's purpose, the decision below allows employers to take risks at the expense of employee security.

The notion that the decision fosters ERISA's purpose by encouraging employer participation is incorrect. Plan participation is encouraged only as a means of ensuring plan maintenance and growth:

> The act is designed to foster plan continuation and growth *because plan continuation and growth provides participants and beneficiaries the greatest security against benefit loss.*

126 Cong. Rec. 11,991 (1980) (remarks of Rep. Thompson); see also 126 Cong. Rec. 20,178 (1980) (remarks of Sen. Javits). In tough times, officers and owners shielded from personal liability have no incentive to honor corporate obligations to contribute. The decision encourages plan participation at the expense of plan solvency, which jeopardizes employee security and subverts ERISA's goals.

In relying on the PBGC opinion letter, the seventh circuit again confused the design of ERISA. The letter only concerns withdrawal liability under Title IV of ERISA. (Id, *infra.*) It did not concern delinquency liability under Title I. Withdrawal and delinquency liability present separate con-

cerns requiring separate treatment. See *Laborers' Health and Welfare Trust Fund for Northern California* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 545-46 (1988). Moreover, since the PBGC only enforces Title IV, its opinion is not entitled to deference here. 29 U.S.C. § 1303(e); *Trustees of Iron Workers' Local 473 Pension Trust* v. *Allied Products Corp.*, 872 F.2d 208, 210 n. 2 (7th Cir. 1989).

Through the letter, the court incorrectly bound determinations of personal liability under § 515 into considerations of state law. Section 515 creates a federal obligation enforceable through a federal cause of action. Sen. Comm. on Labor and Human Resources, 96 Cong. 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980); 29 U.S.C. § 1132(g)(2). The decision suffocates important employee rights under the blanket of state law when, instead, the court should have developed federal common law to breathe life into the Congressional intent. See *Firestone Tire and Rubber Co.* v. *Bruch*, — U.S. — , 109 S.Ct. 948, 954 (1989).

E.

The Consequences of the Decision Below

The decision has an intolerable impact on the private multiemployer system. Plan participants and beneficiaries feel the sting of the delinquencies through lower benefits, and at a time when they can least afford it—during retirement or disability. Moreover, because benefits are not gratuities but are deferred compensation, employees have often foregone wage increases based upon the promise of benefits. 2 Leg. Hist. 1605 (remarks of Sen. Williams); 3 Leg. Hist. 3590 (remarks of Rep. Drinan). Misled workers, who learn

much too late of delinquencies, have no chance to protect themselves and their dependants.

Without the leverage of individual liability provided by ERISA, plans must incur additional costs to discover and obtain the assets of marginal or bankrupt corporations. These additional costs will further deplete available benefits.

The decision below will not comfort those employers who have faithfully honored their contribution obligations. They must bear increased contribution loads to compensate for the delinquencies and added collection costs. Faced with excessive plan contributions, employers may withdraw, which will further weaken and even destroy plans.

If pension plans cannot survive, the onus will fall on the PBGC to guarantee benefits. If losses are excessive, a taxpayer bailout may be needed. Participants and beneficiaries of welfare plans, which do not have PBGC backing, will not be so lucky. In the long run, the erosion of the private multiemployer plan system will force greater reliance on the already overworked Social Security system.

ERISA manifests the high priority which Congress has given to the private multiemployer benefit system. Full and timely contributions are the system's blood. By imposing personal liability, ERISA helps ensure its health. By rejecting liability, the decision below threatens the integrity of plans benefiting workers and their families, many of whom have already been forced to accept reduced benefits. The issue is of national concern and far too important to await the development of a true conflict among circuits. Immediate plenary review is needed.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL VICTOR ESPOSITO
135 South LaSalle Street
Suite 1000
Chicago, Illinois 60603-4274
(312) 580-1250
Counsel for Petitioners.

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-1015

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Plaintiffs-Appellants,

THE PLUMBING COUNCIL OF CHICAGOLAND, PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO AND COOK COUNTY,

Plaintiffs,

v.

ROBERT NIEDRICH and DENISE NIEDRICH,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88-C-6996—**Brian Barnett Duff**, *Judge.*

ARGUED SEPTEMBER 26, 1989—DECIDED DECEMBER 19, 1989

Before COFFEY and EASTERBROOK, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* Plaintiffs-appellants, Plumbers' Pension Fund, Local 130, U.A., Plumbers' Welfare Fund, Local 130, U.A., and the Trust Fund for Apprentice and Journeyman Education and Training, Local 130, U.A.

(hereinafter "Funds") appeal from the district court's dismissal of their complaint that sought to obtain from the defendants-appellees, Robert Niedrich and Denise Niedrich, president and secretary, respectively, of Rob Roy Plumbing, Inc. ("Rob Roy") delinquent contributions owed to the Funds under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*[1] We affirm.

I.

Because this case arises on a motion to dismiss, our review is confined to the limited facts set forth in the Funds' complaint. The Funds' complaint alleges that Rob Roy Plumbing, Inc., ("Rob Roy") and the Chicago Journeyman Plumbers' Local Union 130, U.A. ("Union") entered into a collective bargaining agreement effective January 1, 1976 and terminating on December 31, 1983. Under the terms of this agreement the plumbing firm (Rob Roy) was obligated to make periodic contributions to the plaintiff Funds. The complaint alleges that Robert Niedrich and Denise Niedrich, respectively the former president and secretary of Rob Roy, "exercised control over and acted on behalf of Rob Roy in matters pertaining to employee relations, including employee benefits." The complaint further alleges that when Rob Roy failed to make contributions to the plaintiff Funds, the Union and the Funds requested and were granted arbitration pursuant to the agreement.

A joint arbitration board established under the agreement awarded the plaintiff Funds, the Plumbing Council of Chicagoland and the Plumbing Contractors Association

[1] The Plumbing Council of Chicagoland and the Plumbing Contractors Association of Chicago and Cook County were also plaintiffs in the district court. However, these two plaintiffs have chosen not to appeal the district court's decision.

of Chicago and Cook County $25,066.78.[2] Rob Roy failed to pay the amount designated in the arbitration award and the plaintiff Funds, together with the Plumbing Council of Chicagoland and the Plumbing Contractors Association of Chicago and Cook County filed a complaint against Rob Roy requesting enforcement of the arbitration award.[3] On August 12, 1985, judgment was entered, pursuant to the complaint, against Rob Roy Plumbing, Inc. in the amount of $23,020.90.[4] Rob Roy failed to satisfy the judgment and the Illinois Secretary of State dissolved the plumbing firm on May 1, 1986.

On August 12, 1988, the plaintiff Funds, the Plumbing Council and the Plumbing Contractors Association filed this action individually against Robert and Denise Niedrich, respectively the former president and secretary of Rob Roy. The complaint alleged that the Niedrichs were personally liable for the delinquent contributions to the plaintiffs under ERISA and sought from each defendant $23,020.92 together with interest and attorneys' fees. The complaint alleged that the Niedrichs had violated 29 U.S.C. § 1145[5] because their exercise of control over and

---

[2] This amount was divided among the various parties as follows: Plumbers' Pension Fund - $10,491.76, Plumbers' Welfare Fund - $12,576.01 (including 5 percent late payment charge), Trust Fund for Apprentice and Journeyman Education and Training - $952.34, Plumbing Council of Chicagoland - $735.46, and Plumbing Contractors Association of Chicago and Cook County - $311.21.

[3] The complaint does not state the court in which this complaint was filed. The Plumbing Council of Chicago and the Plumbing Contractors Association of Chicago and Cook County were also parties to the state court lawsuit.

[4] The complaint does not explain the discrepancy between the $23,020.90 amount the court awarded and the $25,066.78 amount the arbitration board had awarded.

[5] 29 U.S.C. § 1145 reads:

"Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under

(Footnote continued on following page)

actions on behalf of Rob Roy "in matters pertaining to employee relations, including employee benefits" meant that they were "employers" within the meaning of 29 U.S.C. § 1002(5)[6] and, thus, personally liable for Rob Roy's delinquent contributions. The district court held that the complaint did not allege facts sufficient to establish that Rob Roy's corporate veil should be pierced.[7] In their brief before this court, plaintiffs-appellants concede that neither of these factors is present.

The Niedrichs moved to dismiss the complaint for failure to state a claim upon which relief can be granted on the grounds that under ERISA they could neither be classified as "employers" nor as parties who had unilaterally and contractually agreed to make contributions to the plaintiffs. In view of the fact that the defendants were parties to neither the plan nor the collective bargaining agreement, the district court held that "unless there are grounds to pierce the corporate veil or the corporation is the alter ego of the controlling individual, that individual is not liable under § 1145 unless he or she is

---

[5] *continued*

the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

[6] 29 U.S.C. § 1002(5) reads:

"For purposes of this subchapter:

* * *

(5) The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

[7] *Plumbers' Pension Fund, Local 130, U.A. v. Niedrich*, 701 F. Supp. 651, 655 (N.D. Ill. 1988). Although the district court did not explicitly conclude that the complaint failed to allege that Rob Roy was an "alter ego" of either defendant, it is clear from the court's dismissal of the Funds' ERISA claim that it concluded that Rob Roy was not the "alter ego" of either defendant.

a party to the plan or collective bargaining agreement." *Plumbers' Pension Fund, Local 130, U.A. v. Niedrich*, 701 F. Supp. 651, 655 (N.D. Ill. 1988). Because the plaintiffs had not alleged that the Niedrichs were parties to the plan or to the collective bargaining agreement, that Rob Roy's corporate veil warranted piercing or that Rob Roy was the Niedrichs' alter ego, the district court dismissed the complaint. The plaintiff Funds appeal from the district court's ERISA decision.[8]

II.

The Funds' action against the Niedrichs under ERISA was dismissed for failure to state a claim upon which relief may be granted.

> "We review such a dismissal *de novo*. The well-pleaded factual allegations of the complaint and all reasonable inferences which follow from the allegations must be taken as true. A complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"

Corcoran v. Chicago Park District, 875 F.2d 609, 611 (7th Cir. 1989) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) (citation omitted).

On numerous occasions in similar factual situations courts of appeals have had the opportunity to address the question of whether individuals acting as corporate officers or shareholders can be held personally liable for a corporation's ERISA obligations. These courts have unanimous-

---

[8] The district court also determined that it lacked jurisdiction over the plaintiffs' action against the Niedrichs under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), on the basis of this court's decision in *Loss v. Blankenship*, 673 F.2d 942, 946-48 (7th Cir. 1982), that "affirmed the general principle that persons who are not parties to a collective bargaining agreement cannot be sued under the LMRA." *Niedrich*, 701 F. Supp. at 655. Plaintiff Funds do not appeal from this holding.

ly held, as the court held in this case, that unless the corporation is acting for and an alter ego of the individual or there exist facts that warrant piercing the corporate veil, the individual will not be held liable for the corporation's obligations under ERISA. *See Rockney v. Blohorn*, 877 F.2d 637, 639-43 (8th Cir. 1989) ("[C]orporate officers cannot be held personally liable under ERISA where there is no basis for piercing the corporate veil"); *Scarbrough v. Perez*, 870 F.2d 1079, 1082-85 (6th Cir. 1989) (Unless facts warrant piercing the corporate veil separating the corporate employer from its owner-chief executive, the owner-executive will not be held liable for the corporation's delinquent pension contributions); *International Brotherhood of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546, 1547-50 (D.C. Cir. 1988) (Corporation's chief officer and principal shareholder is not liable for corporation's delinquent contributions in the absence of allegations that he personally was a party to the plan or collective bargaining agreement and where there are no allegations that the corporation was an alter ego or of conduct that would require piercing the corporate veil); *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 24-26 (1st Cir. 1988) (Corporation's president and sole shareholder is not liable for corporation's delinquent pension contributions unless it can be established that he was acting other than as a company officer and had, thus, personally contractually obligated himself to guarantee pension contributions); *Solomon v. Klein*, 770 F.2d 352, 353-55 (3rd Cir. 1985) (In the absence of allegations of alter ego status or that warrant piercing the corporate veil, or of a contractual obligation, president of corporation who was also fifty percent stockholder was not personally liable for delinquent contributions to a retirement fund); *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 515 (9th Cir. 1984) (Kennedy, J.) ("An owner of a corporation will be held personally liable for trust fund contributions if (1) there is little or no respect shown to the separate identity of the corporation; (2) recognition of the corporation as a separate en-

tity would result in injustice to the litigants; and (3) there was a fraudulent intent behind the incorporation").

In *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1192-94 (7th Cir. 1989); we noted our general agreement with the rationale of these cases. *Levit* was a bankruptcy case that did not approach the issue of a corporate officer's liability for pension contributions in the usual context of a pension fund's attempt to recover delinquent contributions from a corporate officer.[9] Nonetheless, we were required to determine whether a corporate officer could be held personally liable for a corporation's pension contributions in the absence of a contract personally binding him to these obligations. In resolving this question we turned to Section 515 of ERISA, 29 U.S.C. § 1145 that requires "[e]very employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement [to] make such contributions in accordance with the terms and conditions of such plan or such agreement." We stated that under Section 515:

> "Only 'an employer *who is obligated to make contributions* to' a plan under an agreement need do so. Such an employer must make contributions 'in accordance with the terms and conditions of such plan or such agreement.' Even if a manager or other officer is an 'employer' under § 3(5) [of ERISA], the plan or other agreement still governs what each must

[9] *Levit* arose in the context of a bankruptcy trustee's attempts to recover funds a bankrupt corporation had paid to a pension fund. The trustee attempted to establish that the bankrupt corporation's "insiders" were potentially liable for the corporation's pension contributions, meaning that payments to the pension funds reduced the insider's exposure to liability. The trustee also attempted to demonstrate the related fact that the insiders were "creditors" as they would "hold contingent claims against the debtor if [the insiders] should be called on to satisfy [the corporation's] debts to the pension and welfare funds . . . ." *Levit*, 874 F.2d at 1192.

> do, for not all 'employers' are 'obligated to make contributions' under the 'terms and conditions' of a plan or agreement. [*Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (en banc)] holds that these documents will be strictly enforced. Exactitude works both ways. Just as pension and welfare funds get no less than the agreements provide, so they get no more. . . . Several plans obtained Richard Deprizio's [the corporate officer] personal commitment, as co-maker of notes with Deprizio Co. Other plans had only Deprizio Co.'s commitment to pay. Section 515 requires us to honor the difference between these engagements."

Levit, 874 F.2d at 1193 (emphasis in original). As well as emphasizing the language of Section 515 of ERISA, we relied upon an opinion letter of the General Counsel of the Pension Benefit Guaranty Corp., the agency that insures multi-employer pension funds, that stated that " 'ERISA has no special rules regarding shareholder-officer liability. Accordingly, this issue is usually determined by state law, which generally provides that shareholders are not liable for the debts of a corporation.' " *Levit*, 874 F.2d at 1193 (quoting General Counsel of the Pension Benefit Guaranty Corp., Opinion Letter 82-38 (December 14, 1982)). We further noted the precedent of other courts stating:

> "Courts routinely rebuff efforts to collect pension debts from managers and investors unless the officer or investor would be liable for the firm's other debts under state law—in other words, unless courts would 'pierce the corporate veil' in light of the structure and operation of the particular firm."

Levit, 874 F.2d at 1193. In light of the administrative interpretation of ERISA and the controlling case law we concluded:

> "It would take a compelling argument to persuade us to depart from an interpretation of the law adopted by a responsible agency and followed by so many courts. Inferences from the importation into

> ERISA of a few words from the [Fair Labor Standards Act] do not satisfy that standard.
>
> An officer who does not make a contractual commitment to a pension or welfare plan still could be personally liable, to the extent he is liable for general corporate debts under state corporate law. But when state law recognizes a separate identity of manager and firm, liability under ERISA depends on the contents of the plan and related agreements."

Levit, 874 F.2d at 1194 (citation and footnote omitted).

We see no reason to alter, much less overturn, our decision in *Levit* concerning personal liability under ERISA and we apply *Levit*'s analysis here. It is undisputed that the Niedrichs were neither parties to the Pension Plan nor the collective bargaining agreement that obligated the firm Rob Roy Plumbing, Inc. to contribute to the Pension Plan. Thus, the Niedrichs were not personally obligated to make contributions to the Pension Plan. Furthermore, there is no allegation that Rob Roy was an alter ego of the Niedrichs or of facts sufficient to warrant piercing Rob Roy's corporate veil. Accordingly, the *Levit* analysis mandates dismissal of the complaint for failure to state a claim upon which relief may be granted.

The plaintiff Funds contend that their complaint states a claim upon which relief may be granted, even under *Levit*, as Illinois state law would require a conclusion that the Niedrichs were personally liable for Rob Roy's delinquent pension contributions. The plaintiff Funds cite the language in Section 13 of the Illinois Wage Payment and Collection Act, Ill. Ann. Stat. ch. 48, ¶ 39m-13 (Smith-Hurd 1986), that states "any officers of a corporation or agents of an employer who knowingly permit such employer to violate the provisions of this Act shall be deemed to be the employers of the employees of the corporation." The basic difficulty with the Funds' position is that, in the context of pension contributions, the Illinois Wage Payment and Collection Act is expressly preempted by ERISA. *See Arnold v. Babcock and Wilcox Co.*, 123 Ill.

2d 67, 525 N.E.2d 59, 62-63 (1988). Although the Funds acknowledge that ERISA preempts a cause of action under the Illinois Wage Payment and Collection Act, they assert that Section 13 of that Act is nevertheless applicable to this case because of *Levit*'s holding that the personal liability of officers is to be determined under "state corporate law." *Levit*, 874 F.2d at 1194. We disagree with the plaintiffs' contention. Although *Levit* establishes that "[a]n officer who does not make a contractual commitment to a pension or welfare plan still could be personally liable, to the extent he is liable for general corporate debts under state corporate law," *id.* at 1194, we are not of the opinion that Section 13 of the Illinois Wage Payment and Collection Act provides an appropriate basis for establishing this liability under state law. By its very words this section proscribes and limits actions under the Illinois Wage Payment and Collection Act, a law that cannot be applied to pension contributions as a result of ERISA's preemptive scope.[10] Since the plaintiffs-appellants Funds fail to cite any of the Illinois statutory or case law that would render the Niedrichs personally liable for Rob Roy's delinquent pension contributions in this case, we hold that Illinois state law does not provide a ground for the Funds' cause of action that could prevent the dismissal of the Funds' complaint.

Corporate officers who are not parties to a pension plan or a collective bargaining agreement requiring contributions to a pension plan are personally liable for pension contributions only to the extent they are liable for general corporate debts under state corporate law. Because the complaint fails to allege facts demonstrating that Rob Roy

---

[10] Section 13 of the Illinois Wage Payment and Collection Act, Ill. Ann. Stat. ch. 48, ¶ 39m-13 (Smith-Hurd 1986) provides:

> "Any officers of a corporation or agents of an employer who knowingly permit such employer to violate *the provisions of this Act* shall be deemed to be the employers of the employees of the corporation."

(Emphasis added).

was the Niedrichs' alter ego, that Rob Roy's corporate veil should be pierced, a personal contractual guarantee to pay pension contributions or any other basis for establishing the Niedrichs' personal liability under state law, we hold that the district court action dismissing the plaintiff Funds' complaint was proper. The decision of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—12-19-89—500

JUDGMENT — ORAL ARGUMENT
United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

DECEMBER 19, 1989.

BEFORE
Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. JESSE E. ESCHBACH, Sr. Circuit Judge

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130 U.A., TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION & TRAINING, LOCAL 130, U.A., PLUMBING COUNCIL OF CHICAGOLAND and PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO & COOK COUNTY,

Plaintiffs-Appellants,

vs.

No. 89-1015
ROBERT NIEDRICH and DENISE NIEDRICH,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 88 C 6996
Brian Barnett Duff, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PLUMBERS' PENSION FUND, LOCAL 130, U.A.; PLUMBERS' WELFARE FUND, LOCAL 130, U.A.; THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.; THE PLUMBING COUNCIL OF CHICAGOLAND; PLUMBING CONTRACTORS ASSOCIATION OF CHICAGO AND COOK COUNTY,

Plaintiffs,

v.

ROBERT NIEDRICH, and DENISE NIEDRICH,

Defendants.

No. 88 C 6996

MEMORANDUM OPINION

Rob Roy Plumbing, Inc. was a plumbing contractor whose principal place of business was Cook County, Illinois. From January 1, 1976 through December 31, 1983, Rob Roy had collective bargaining agreements with the Chicago Journeymen Plumbers' Local Union 130, U.A. Under these agreements, Rob Roy promised to pay various funds—the plaintiffs in this case—various amounts, at stated contribution rates. See Complaint, Exhibits A-B. Article III of each collective bargaining agreement required the parties to submit all disagreements or disputes between them to a Joint Arbitration Board ("JAB"). See *id.*, Exhibit C. One such disagreement arose over the amount Rob Roy owed the funds. Pursuant to their contract, the parties submitted this dispute to the JAB, which determined that Rob Roy owed the plaintiffs $25,066.78. The plaintiffs demanded payment,

but Rob Roy refused to pay. The plaintiffs went to court and obtained a judgment for $23,020.90, but Rob Roy still did not pay.

The plaintiffs then learned, nearly a year later, that Rob Roy went out of business. In fact, the Illinois Secretary of State went so far as to dissolve Rob Roy on May 1, 1986. Naturally the plaintiffs were disappointed, and sought someone to pay Rob Roy's bills. They think they have found such persons in Robert and Denise Niedrich, the former president and secretary of Rob Roy. The plaintiffs filed suit against the Niedrichs in this court on August 12, 1988.

The plaintiffs seek recovery under two theories, one statutory, the other, contractual. The basis for their first claim is 29 U.S.C. § 1145 (1982), which is part of the Employee Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. §§ 1001 et seq. Section 1145 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collective bargaining agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The plantiffs base their contractual claim on the collective bargaining agreements themselves. The plaintiffs submit that this court has jurisdiction over suits for violations of these agreements under § 301 of the Labor Management Relations Act of 1947 ("LMRA"), codified at 29 U.S.C. § 185.

The Niedrichs have moved to dismiss both claims. Their principal argument with respect to each count is that they are not obligated to pay Rob Roy's liabilities—Rob Roy is. The Niedrichs' arguments are subtly different in each instance, since § 1145 actually defines the liability of an entity under ERISA, while § 301 determines the extent of this

court's jurisdiction over a particular type of dispute. In order to decide whether the Niedrichs are correct, this court must interpret each statute, and weigh the Niedrichs' arguments in light of this court's interpretations.

The court begins with §1145. This court will use the same method of interpretation employed in *Bastian* v. *Petren Resources Corp.*, 1988 U.S.Dist. LEXIS 12372. This court thus starts its analysis with the plain words of § 1145. Neither party disputes that the plaintiffs are multiemployer plans as that term is used in § 1145. They dispute the meaning of other words in § 1145, however—words which reflect ambiguities. While § 1145 appears to hold only the parties who so obligate themselves under a contract liable for multiemployer plan contributions—in this case, Rob Roy—ERISA defines "employer" as used in § 1145 as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5). The plaintiffs suggest that this definition widens the scope of liability under § 1145 beyond the person who actually obligated himself under the collective bargaining agreement. While Judge Grady ruled in *Laborers' Pension Fund* v. *Bakke Construction Co.*, 1987 U.S.Dist. LEXIS 10509, 14, that the definition of "employer" "plain[ly]" made corporate officers liable under ERISA, Judge Grady did not reconcile the definition of "employer" with the obligation language of § 1145. Rather than recognizing a plain priority of the word "employer" over the word "obligated" in § 1145, this court finds a plain conflict between the terms.

This court thus must rely on other methods of interpreting § 1145. The context of the words "employer" and "obligated" provides a little help, as the language of § 1145 repeatedly stresses its purpose: making the contractual obli-

gations of employers to multiemployer plans enforceable as a matter of federal law. Section 1145 emphasizes contracts no fewer than four times, in addition to its use of the word "obligated." It seems strange that in making contracts for plan contributions a matter of federal law, Congress would have gone beyond the law of contracts and held persons who are not parties to the contract—constructive or otherwise—liable for contractual obligations. Still, this court cannot ignore ERISA's broad definition of "employer." Given the Congress's desire to provide "minimum standards . . . assuring the equitable character . . . and . . . financial soundness" of benefit plans through ERISA, see 29 U.S.C. § 1001(a), it is not inconceivable that Congress would have expanded the traditional scope of contractual obligations. See *Gambino* v. *Index Sales Corp.*, 673 F.Supp. 1450, 1454-55 (N.D. Ill. 1987) (Shadur, J.) (while not justifying expansion beyond ERISA's terms, the social purposes of the Act support broad liability under § 1145 when other indicators of legislative intent point in the same direction).

In *Bastian*, when this court exhausted the methods of interpreting a statute such as the plan meanings of the words themselves, their context, and the reasonableness of the contending interpretations, this court turned to the legislative history. The court will proceed no differently in this case. Fortunately, unlike in *Bastian*, several courts have had the opportunity to examine the legislative history of the statute in dispute here. Unfortunately, these courts are in conflict.

This court will begin with the historical analyses of § 1145 undertaken by those courts which sit in this district. Judge Shadur presented the first and most exhaustive of these analyses in *Gambino*. In that case, the trustees of a multiemployer pension trust sued the Index Sales Corporation, as well as Index's president, director, and sole shareholder,

Donald Keenan. As a signatory to the collective bargaining agreement that required contributions to the pension trust, Index admitted its liability. Keenan disputed his own, and so Judge Shadur had to decide the very issue posed here. The evidence revealed that there was no factual basis for piercing Index's "corporate veil" under Illinois law. Nevertheless, Keenan was Index's Chief Operating Officer, and he directed all of the company's labor relations, its corporate operations, and its financial transactions—including all matters relating to payments to the pension trust. *Gambino*, 673 F.Supp. at 1451-52.

Judge Shadur first canvassed earlier decisions that had considered the question of individual liability for corporate obligations to multiemployer plans. He noted that district courts in the First Circuit had "consistently held such personal liability existed," and that Judge Warren of the Eastern District of Wisconsin had followed the lead of these courts. Judge Shadur then summarized the various appellate interpretations of § 1145, suggesting that the First Circuit had "pointed the way" toward control-person liability in *Donovan* v. *Agnew*, 712 F.2d 1509 (1st Cir. 1983), but noting that the Third and Ninth Circuits had ruled to the contrary except in cases where a court could pierce the corporate veil. *Gambino*, 673 F.Supp. at 1452-53 & n.4.

Before this court traces Judge Shadur's opinion further, it should be noted that since *Gambino*, the First Circuit reversed the line of district court decisions on which Judge Shadur relied and distinguished *Agnew* in cases involving control-person liability under § 1145. See *Mass. Laborers' Health & Wel. F.* v. *Starrett Paving*, 845 F.2d 23, 26 (1st Cir. 1988). Similarly, the D.C. Circuit has joined the First, Third, and Ninth Circuits in holding that controlling persons are not liable under § 1145, absent a claim that the corporation is the person's alter ego or that it is prudent to pierce

the corporate veil. See *Intern. Broth. of Painters* v. *George A. Kracher*, 856 F.2d 1546 (D.C. Cir. 1988). Thus, whatever power Judge Shadur's opinion has must derive from the force of his reasoning, and not from its foundation in precedent.

Having examined the precedents, Judge Shadur addressed the very question posed here: the extent to which the word "obligated" in § 1145 narrows the broad definition of "employer" in § 1002(5). Judge Shadur held that § 1145 could not limit § 1002(5) to those persons who signed the contract. He reasoned that such a reading "would allow no room at all for the Section 1002(5) definition of 'employer' to include persons 'acting indirectly . . . in the interest of the employer,' " nor would it allow for piercing of the corporate veil. Judge Shadur's fear was that if § 1145 limited § 1002(5), it would render § 1002(5) "a nullity." Presuming that Congress did not speak to the issue "in a wholly idle manner," Judge Shadur held that there had to be some room for personal liability for corporate obligations under § 1145. *Gambino*, 673 F.Supp. at 1453-54.

It was thus Judge Shadur's task to determine where personal liability began and ended. To aid him in this task, the Judge turned to the Fair Labor Standards Act ("FLSA"), codified at 29 U.S.C. § 201 et seq., which contains many provisions that are identical to those in ERISA. Judge Shadur considered the Supreme Court's decision in *Falk* v. *Brennan*, 414 U.S. 190, 195 (1974), which interpreted FLSA's nearly parallel definition of "employer" and held that a person who had "substantial control of the terms and conditions of the work" of employees was liable for violations of FLSA, even if that person was not the nominal employer. Judge Shadur then noted that the "uniform judicial reading" of FLSA's definition of "employer", both before and after *Falk* and ERISA,

> has been that such a broad-sweep definition was intended to strip away that insulation where the corporation-controlling individual has opted to prefer the payment of other corporate debts to the payment of obligations running to corporate employees and given special statutory recognition by Congress.

The Judge then concluded that as the courts had "implemented that intention under FLSA, . . . they should do no less than under ERISA's substantively identical provisions." *Gambino*, 673 F.Supp. at 1454-55 (footnote omitted).

Judge Shadur felt that his conclusion was superior to that reached by the Third and Ninth Circuits because they had not considered the parallel definition of "employer" in FLSA. He reasoned that, were their interpretations of § 1145 to prevail, a court would be compelled to overrule the entire line of FLSA cases that weighed in favor of control-person liability. *Id.* at 1455-56 & n.12. Judge Shadur was correct in this observation, as both the Third and Ninth Circuits had reached their result by limiting ERISA's definition of "employer" in § 1002(5), and not by relying on the "obligated" language of § 1145. See *Audit Services, Inc.* v. *Rolfson*, 641 F.2d 757, 764 (9th Cir. 1981); *Solomon* v. *Klein*, 770 F.2d 352, 353-54 (3d Cir. 1985).

Were this case solely about § 1002(5), Judge Shadur's logic would be unassailable: it would be folly to interpret identical language in FLSA and ERISA differently for each statute, absent a clear indication from the context or history of the two provisions. But this is not a case of identical provisions, as ERISA's § 1145 has no counterpart in FLSA. While this court agrees with Judge Shadur that, in using the expansive term "employer" in § 1145, Congress did not limit liability under § 1145 only to signatories of plan and collective bargaining agreements, this court cannot accept the Judge's determination that FLSA's definition of employer determines liability under ERISA's § 1145. Rather, if a

court must refer to the legislative history of a statute to determine its meaning, it should start with the history of the provision itself, and not the history or meaning of other statutes.

This court thus turns to the legislative history of § 1145, which the First Circuit canvassed in *Starrett*. There the court noted that Congress wished to impose a federal statutory duty only on those employers "'that are *already contractually obligated* to make contributions to multiemployer plans.'" *Starrett*, 845 F.2d at 25, quoting The Multiemployer Pension Plan Amendments Act of 1980, S. 1076, Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess. 44 (Comm. Print 1980) (emphasis added). The *Starrett* court also noted that its view of the primacy of contractual obligations in § 1145 was consistent with the Supreme Court's position in *Laborers' Health & Welfare Tr.* v. *Adv. Light Con.*, 108 S.Ct. 830, 835-36 (1988), that Congress enacted § 1145 to provide employers with incentives to honor their contracts. *Starrett*, 845 F.2d at 25.

The *Starrett* court also addressed Judge Shadur's concern in *Gambino* that emphasizing contracts in § 1145 would render § 1002(5) a nullity, or at least prevent a court from piercing the corporate veil in § 1145 cases. The court noted first that, while its holding did limit the effect of § 1002(5) in § 1145 cases, "the expanded definition could still make a different elsewhere in [ERISA]." This observation allowed the *Starrett* court to strike the proper balance between the enactment of § 1145—a provision that has no parallel in FLSA—and Judge Shadur's reasoning that, where Congress has copied language from one statute to another, the courts should interpret the language consistently in each. The court reasoned that the broad definition of "employer" in § 1002(5) would continue to play an important role in those

instances where Congress looked to FLSA, but not in those instances where Congress did not rely on FLSA. As for Judge Shadur's view of corporate veils, the *Starrett* court remarked that piercing that veil under state or federal common law was entirely consistent with the language of § 1145, since the owner in that instance would be the corporation for purposes of ERISA, and obligated under the state or federal law of contracts to pay a benefit plan. *Starrett,* 845 F.2d at 25-26.

This court is mindful of its duty to give proper deference to the opinions of those who sit in this same district. This court has considered the views of Judges Shadur, Grady, and Moran in *Gambino, Bakke,* and *Serembus* v. *Comfort Lines, Inc.,* 689 F.Supp. 1496 (N.D. Ill. 1988), respectively, and finds that they are not as convincing as that expressed in *Starrett.* The cases from this district rely on precedents that have been overruled or narrowed, and they have not considered the legislative history of § 1145 as described in *Starrett.* This court does not share Judge Shadur's concern that a refusal to incorporate FLSA's standard of employer liability in § 1145 will render it and §1002(5) of ERISA nullities. In light of this and the unanimous opinions of those Courts of Appeals that have decided the issue presented here to the contrary of the decisions in *Gambino, Bakke,* and *Serembus,* this court holds that unless there are grounds to pierce the corporate veil or the corporation is the alter ego of the controlling individual, that individual is not liable under § 1145 unless he or she is a party to the plan or collective bargaining agreement. Because the plaintiffs here have not alleged that Rob Roy's corporate veil warrants piercing, this court must dismiss Count 1 of the Complaint for failure to state a claim upon which this court can grant relief.

This court now turns to Count 2. The Niedrichs contend that the plaintiffs cannot sue them in this court under

§ 301(a) of LMRA because the Niedrichs were not parties to Rob Roy's collective bargaining agreement. In *Loss* v. *Blakenship,* 673 F.2d 942, 946-48 (7th Cir. 1982), the court affirmed the general principle that persons who are not parties to a collective bargaining agreement cannot be sued under the LMRA. The only exception that the court recognized to this rule was for "suits against one owing a 'fiduciary duty' to the plaintiff." *Id.* at 948, quoting *Nedd* v. *United Mine Workers of America,* 556 F.2d 190, 198 n.13 (3d Cir. 1977). The plaintiffs do not contest *Loss,* nor have they alleged in their complaint that the Niedrichs owed them a fiduciary duty. They make one suggestion in their Brief in Response to Defendants' Motion to Dismiss that since the Niedrichs are employers for purposes of ERISA, they should be amenable to suit under the LMRA. The plaintiffs cite no authority for this proposition, however, nor do they present any reason as to why this court should broaden the holding of *Loss.* For this reason, this court must dismiss Count 2 for want of jurisdiction.

In summary, this court grants the Niedrichs' motion to dismiss Count 1 of the Complaint for failure to state a claim, and grants their motion to dismiss Count 2 for lack of jurisdiction.

ENTER:

/s/ BRIAN BARNETT DUFF
Brian Barnett Duff, Judge
United States District Court

DATE: December 5, 1988

Pension Benefit Guaranty Corporation

82-38

December 14, 1982

OPINION:

This responds to your letter raising the question of whether officers or shareholders may be held liable for a corporation's liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended.

In your letter, and in a subsequent telephone conversation with *** of this office, you indicated that your company had made contributions into the Local ***. *** Pension and Trust Fund until about a year ago. You also indicated that your company filed a Chapter 11 Bankruptcy petition in 1970, that in November 1981 the company's plan of arrangement was confirmed and that at that time, "union officials accepted a 10% repayment on approximately a $20,000 balance owed to the pension fund." Now you have received a letter from the "union" stating that *** has incurred withdrawal liability in the amount of $210,000. You are concerned as to how this amount was reaching and as to whether you or other principals can be held personally liable.

Under ERISA, any employer that completely or partially withdraws from a multiemployer plan must pay its share of the plan's unfunded liability. The exact amount of this contingent liability is determined under ERISA Section 4211.

Under ERISA, the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan. If the plan sponsor makes such a determination, and if the employer objects,

the matter must then be resolved through the dispute resolution procedures described in Sections 4219 and 4221 of ERISA.

With regard to your question as to individual shareholder responsibility for withdrawal liability, we note that ERISA has no special rules regarding shareholder or officer liability. Accordingly, this issue is usually determined by State law, which generally provides that shareholders are not liable for the debts of a corporation. You should, however, be aware that the laws of every state contain exceptions to this general principle.

If you have any questions on this matter, please contact *** of this office at (202) 254-4895.

Henry Rose

General Counsel

Supreme Court, U.S.
FILED
APR 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1456

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH and DENISE NIEDRICH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DANIEL R. MURRAY
Counsel of Record
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Attorney for Respondents

Of Counsel:

JOHN J. DUNBAR
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly declined to expand the provisions of ERISA to make a corporate officer personally liable for pension contributions under an ERISA provision imposing liability only upon "employers" who are "obligated" to make contributions.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT	2
REASONS FOR DENYING THE WRIT	3
A. The Courts Agree That Officers Like The Niedrichs Are Not Liable Under § 515	5
B. Section 515's Requirement Of A Contractual Obligation Means What It Says	6
C. The Legislative History Also Shows That A Contractual Obligation Is Required	9
D. Section 515 Was Not Intended To Revoke The Long Established Principle Of Limited Corporate Liability	11
E. Any Similarities To The FLSA Cannot Void § 515's Requirement Of A Contractual Obligation	12
F. Public Policy Supports The Position Of The Courts Of Appeal	13
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	PAGE
Alman v. Danin, 801 F.2d 1 (1st Cir. 1986) ...	11
Alman v. George Mfg. Co., 680 F. Supp. 56 (D. Mass. 1988)	5
DeBreceni v. Graf Bros. Leasing, Inc., 828 F.2d 877 (1st Cir. 1987), *cert. denied*, 484 U.S. 1024 (1988)	14
International Brotherhood of Painters v. George A. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988)	4, 10, 11, 12, 13
Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) ..	10
Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988)	7-9, 10
Leddy v. Standard Drywall, Inc., 875 F.2d 383 (2d Cir. 1989)	6
Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989)	4, 14
Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2d Cir. 1987)	11
Mason Tenders Dist. Council Welfare Fund v. Dalton, 648 F. Supp. 1309 (S.D.N.Y. 1986)	10, 11
Massachusetts Laborers Health & Welfare Fund v. Starrett Paving Corp., 845 F.2d 23 (1st Cir. 1988)	4, 7, 10, 12, 13, 14
Operating Engineers Pension Plan Fund v. Reed, 726 F.2d 513 (9th Cir. 1984)	4
Plumbers Pension Fund Local 130, U.A. v. Niedrich, 891 F.2d 1297 (7th Cir. 1989)	2, 3, 4, 7, 11, 12

Plumbers Pension Fund Local 130 U.A. v. Niedrich, 701 F. Supp. 651 (N.D. Ill. 1988) 2, 3, 6-7, 12

Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989) .. 4, 13

Rubenstein v. Tri-State Transport, Inc., 646 F. Supp. 1 (D. Mass. 1984) 5

Scarborough v. Perez, 870 F.2d 1079 (6th Cir. 1989) 4

Serembus v. Comfort Lines, Inc., 689 F. Supp. 1496 (N.D. Ill. 1988) 5

Solomon v. Klein, 770 F.2d 352 (3d Cir. 1985) .. 4

Walter E. Heller & Co. v. Video Innovations, Inc., 730 F.2d 50 (2d Cir. 1983) 6

West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Co., 685 F. Supp. 953 (S.D. W.Va. 1988) 5

Statutes

28 U.S.C. § 1254(1) 2

29 U.S.C. § 158(a)(5) 8

29 U.S.C. § 1002(5) 3, 12

29 U.S.C. § 1145 ..... *passim*

29 U.S.C. § 1381(a) 9

Fair Labor Standards Act of 1938, June 25, 1938, c. 676, 52 Stat. 1060, now codified at 29 U.S.C. §§ 201-219 ..... 6, 12-13

Multiemployer Pension Plan Amendments Act of 1980, September 26, 1980, Pub.L. No. 96-364, 94 Stat. 1208 14

Miscellaneous

Opinion Letter No. 82-38 of the General Counsel of the Pension Benefit Guaranty Corporation (Dec. 14, 1982) 4, 12

No. 89-1456

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH and DENISE NIEDRICH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents Robert and Denise Niedrich ("Niedrichs"), by their attorneys, submit this brief in opposition to the petition for a writ of certiorari by three pension and benefit funds ("Funds").

OPINIONS BELOW

The opinion of the court of appeals (Petn. App. 1a-11a) is reported at 891 F.2d 1297. The opinion of the district court (App. 1c-10c) is reported at 701 F.Supp. 651.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1989. (App. 1b). The writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The Funds filed their action for unpaid contributions under § 515 of the Employee Retirement Income Security Act ("ERISA"), which makes an "employer who is obligated to make contributions" liable for unpaid contributions. 29 U.S.C. § 1145.[1] The obligation to make contributions in this case arose from a collective bargaining agreement between a union and Rob Roy Plumbing, Inc. ("Rob Roy").

[1] Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with terms and conditions of such plan or such agreement.

29 U.S.C. § 1145.

(App. 2c). The Niedrichs were not parties to the agreement, and the Funds conceded that no facts warranted piercing the corporate veil or treating Rob Roy as the Niedrichs' alter ego. (App. 4a, 9a).

The district court dismissed the complaint, and the court of appeals affirmed. (App. 9c, 10c, 10a-11a). As both courts properly found, because the Niedrichs have no contractual obligation to the Funds, and because there is no reason to pierce the corporate veil, the Niedrichs are not liable under § 515. (*Id.*)

REASONS FOR DENYING THE WRIT

The decisions below were in accord with decisions by six other circuits. There is no split in the circuits here, and no reason to grant this petition. As both the district court and the court of appeals recognized, whether or not the Niedrichs are "employers" under 29 U.S.C. § 1002(5), they still are not liable under § 515 of ERISA. (App. 7c, 7a-8a). As the court of appeals correctly reasoned, § 515 does not impose liability on *all* employers. (App. 8a). Instead, § 515 imposes liability only on the "employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or the terms of a collectively bargained agreement. . . ." 29 U.S.C. § 1145.

The Funds have never argued that the terms of the collective bargaining agreement imposed any duty on the Niedrichs to contribute to the Funds, and the Funds conceded below that no facts warrant piercing the corporate veil or treating Rob Roy as the Niedrichs' alter ego. (App. 4a). Instead, as they did below, the Funds argue that, in enacting ERISA, Congress meant to discard these traditional, limited exceptions to the principle of corporate

liability and broadly impose personal liability on corporate officers for obligations of the corporation. (Petn. 14, 15). What the Funds brush over is that every United States Court of Appeals that has decided the issue has rejected the Funds' argument.

In fact, seven circuits have rejected the Funds' position, because: (1) corporate officers like the Niedrichs are not "employers" under ERISA, and therefore are not covered by § 515; and/or (2) whether or not officers are "employers" under ERISA, § 515 does not impose liability on officers, like the Niedrichs, who are not contractually obligated to make contributions.[2] Though the analyses used by these courts have differed slightly, the result always has been the same: an individual who is not contractually obligated to contribute to a multiemployer pension plan will not be liable for the corporation's obligations unless the corporation acts as alter ego of the individual or facts exist that warrant piercing the corporate veil.

---

[2] *Plumbers Pension Fund Local 130, U.A. v. Niedrich*, 891 F.2d 1297, 1299-1301 (7th Cir. 1989) (officer had no contractual obligation); *Rockney v. Blohorn*, 877 F.2d 637, 642 (8th Cir. 1989) (officer not an employer, non-parties to agreement are not liable); *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1193 (7th Cir. 1989) (officer had no contractual obligation); *Scarborough v. Perez*, 870 F.2d 1079, 1082-84 (6th Cir. 1989) (officer not an employer and had no contractual obligation); *International Brotherhood of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546, 1547-50 & n.12 (D.C. Cir. 1988) (same); *Massachusetts Laborers Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 25-27 (1st Cir. 1988) (officer had no contractual obligation); *Solomon v. Klein*, 770 F.2d 352, 354 (3d Cir. 1985) (officer not an employer); *Operating Engineers Pension Plan Fund v. Reed*, 726 F.2d 513, 515 (9th Cir. 1984) (Kennedy, J.) (same). An opinion by the general counsel of the agency charged with insuring multiemployer pension funds, who interpreted an analogous provision of ERISA, is in accord. General Counsel of the Pension Benefit Guaranty Corp. ("PBGC"), Opinion Letter 82-38 (Dec. 4, 1982) (App. 1d-2d).

As the Funds concede, an examination of these decisions reveals that there is no "true conflict" among the circuits. (Petn. 17). The decisions are in accord with decisions of this Court. The issue also is not important enough to warrant review. The dire consequences foreseen by the Funds (Petn. 16-17) can be avoided if funds take the simple measure of requiring personal guarantees from key corporate officials. Thus, there is no reason for this Court to consider the issues raised in this petition.

Nevertheless, the Funds attempt to escape the statute's controlling language with six different arguments. Each of these arguments has been shown to be invalid, either by the Seventh Circuit in this case or by one of the six other circuits that have decided the issue here.

A. The Courts Agree That Officers Like The Niedrichs Are Not Liable Under § 515.

First, the Funds contend that there is substantial disagreement among the lower courts about the meaning of § 515. (Petn. 9-12). To support this assertion, the Funds cling to several overruled district court decisions within the Seventh Circuit,[3] as well as several overruled decisions by the District of Massachusetts[4] and one decision by the Southern District of West Virginia.[5] All but the last of these decisions have had the rug pulled out from

---

[3] *E.g., Serembus v. Comfort Lines, Inc.*, 689 F. Supp. 1496, 1498 (N.D. Ill. 1988) (collecting cases).

[4] *E.g., Rubenstein v. Tri-State Transport, Inc.*, 646 F. Supp. 1, 2 (D. Mass. 1984); *but see Alman v. George Mfg. Corp.*, 680 F. Supp. 56, 58 (D. Mass. 1988) (rejecting earlier decisions from the District of Massachusetts because they ignored requirement that employer be contractually obligated).

[5] *West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Co.*, 685 F. Supp. 953, 954-55 (S.D. W.Va. 1988).

under them. A contrary decision from one district court does not create a conflict worthy of review.

Attempting to split the wall of authority before them, the Funds also contend that the Second Circuit is leaning in the direction favored by the Funds. The Funds, however, cite only *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 388 (2d Cir. 1989). (Petn. 12). In *Leddy*, a company president who had been sued under § 515 had already pled guilty to federal criminal charges resulting from his scheme to defraud the plaintiff benefit funds through the use of dummy "alter ego" corporations. *Id.* at 384, 385, 387. As the Second Circuit found, because the president had engaged in a criminal conspiracy to defraud the funds, there was no need to decide whether to equate the scope of ERISA with that of the Fair Labor Standards Act ("FLSA"). *Id.* at 387.

In this case, the Funds have never alleged any fraud by the Niedrichs. Moreover, corporate law has long provided that the corporate form may not be used as a shield for fraud. *E.g., Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.3d 50, 53-54 (2d Cir. 1983). Thus, the Second Circuit's opinion in *Leddy* is consistent with the seven other circuits' position that corporate officers can be liable for the contributions the corporation is obliged to make only if there is evidence supporting a traditional exception to the principle of limited corporate liability.

B. Section 515's Requirement Of A Contractual Obligation Means What It Says.

Second, the Funds argue that the court of appeals misconstrued § 515 by interpreting the language "employer who is obligated to make contributions" as imposing liability only on those with a contractual obligation to make the contributions. However, as the district court noted,

in addition to the word "obligated," § 515 emphasizes contracts no less than four times. (App. 4c). The statute here plainly expresses the requirement of a contractual obligation, and that language cannot be ignored. Nevertheless, according to the Funds, § 515 is entitled to a much broader reading. Although § 515 makes absolutely no mention of employers "who exercise control over plan contributions," the Funds contend that § 515 should be read creatively to ensnare such individuals within its net. (Petn. 13-14). In support of this expansive interpretation, the Funds contend that the phrase "employer who is obligated" is not designed to limit "applicable employers," and instead is only intended to limit "applicable benefit plans." (Petn. 13).

The Funds never made this argument to the district court and the argument was not considered in the decision by the court of appeals. In any event, the same argument has been made—and soundly rejected—before. Like the Funds here, the funds in *Starrett* argued that the words "obligated to make contributions" are words of "explanation, not limitation." 845 F.2d at 26. Unpersuaded, the First Circuit responded that "even if we take these words as words of 'explanation,' they seem to explain *whom* ERISA obliges and we can find nothing else in the statute that imposes an ERISA obligation to contribute on persons whom state law (or some other law) does *not* oblige." *Id.* (emphasis in original).

The Funds cite only one decision for their view that § 515 is "descriptive only," and in that case this Court rejected an argument very similar to the one made by the Funds in this case. *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988) (Petn. 14). Though the Funds quote language from the Court's opinion, the quoted language is taken completely out of context.

In *Advanced Lightweight Concrete*, this Court affirmed dismissal of an action by pension funds which claimed that an employer's decision to withdraw from a multiemployer plan constituted a breach of its duty to bargain in good faith under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5). Though the NLRA vests exclusive jurisdiction over such disputes in the National Labor Relations Board ("NLRB"), the funds argued that the district court had jurisdiction under two ERISA provisions, including § 515. This Court disagreed, unanimously holding that the remedy afforded by § 515 is "limited to the collection of 'promised contributions,' " 484 U.S. at 541, and that the text of § 515 "plainly describes the employer's contractual obligation to make contributions but omits any reference to a non-contractual obligation imposed by the NLRA." *Id.* at 546.

Like the Funds here, the funds in *Advanced Lightweight Concrete* argued that § 515's "operative phrase," *i.e.*, "employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement," could be read to mean employers "whose contributions are *defined and measured by the terms* of a collective bargaining agreement, but whose obligation to contribute exists as a matter of law, independent of the contract." *Id.* at 549-50 n. 16 (emphasis added by the Court). This Court flatly disagreed.

> So read, § 515 would require employers to adhere to all legal duties to make contributions to collectively-bargained plans. In other words, [the funds] construe the word "under" to mean "defined and measured by," and read "obligated" to include both contractual and statutory duties. But if Congress had meant to say this, surely it could have done so more clearly; as written, § 515 plainly refers to obligations that

> themselves arise from either a "plan" or a "collectively bargained agreement."

Id.

Despite this clear rejection of a position very similar to their own, the Funds cite a portion of a sentence from the Court's opinion for the proposition that "§ 515 provides only for a contractual *origin* for delinquency liability," *id.* (emphasis added by Funds) (Petn. 14), as if this meant that it would be appropriate to disregard the original contractual obligation and impose broader liability. In fact, the Court recited this language when it rejected an argument that § 515 could be used to create a statutory cause of action.[6] Accordingly, *Advanced Lightweight Concrete* provides no support for the Funds' position.

The Funds' attempt to ignore the plain language of § 515 must be rejected. The Niedrichs were not parties to the collective bargaining agreement, and the Funds may not avoid this fact by rewriting the statute on which their claim is based.

C. The Legislative History Also Shows That A Contractual Obligation Is Required.

Third, the Funds argue that the legislative history supports their attempt to read out of the statute the plain lan-

---

[6] The Court rejected the funds' analogy between ERISA's delinquency and withdrawal liability provisions, reasoning that "while withdrawal liability [under 29 U.S.C. § 1381(a)] may arise from both contractual and statutory duties, § 515 provides only for a contractual origin for delinquency liability." 484 U.S. at 550 n. 16. As the Court explained, "the fact that Congress intended withdrawal and delinquency liability to have similar remedies [does not lead] to the erroneous conclusion that withdrawal and delinquency liability are themselves equivalent because both originated in contractual and statutory duties." *Id.* In fact, "§ 515 provides only for a contractual origin for delinquency liability." *Id.*

guage that requires a contractual obligation. In *Advanced Lightweight Concrete*, this Court repeatedly stressed that § 515 was intended to apply to "contractual obligations," and did not impose non-contractual statutory obligations. 484 U.S. at 547-49 & n. 15. To make its point, the Court quoted numerous sections of the legislative history, and repeatedly underscored language indicating that liability would be imposed upon employers who had *contractually promised* to make contributions. Id. at 548-49 nn. 14-15.

Several courts of appeal have correctly pointed out that the legislative history offers no support for the Funds' position. *E.g.*, *Kracher*, 856 F.2d at 1550; *Starrett*, 845 F.2d at 25. As the First Circuit has observed, the "statute's language quite clearly states that the duty in § 515 arises only in respect to employers 'obligated' to make the contributions," and the legislative history of § 515 "indicates that the language means what it says." 845 F.2d at 25. Thus, "even if we do our best to read the history through the eyes of the Plans . . . we can find nothing that suggests we should not follow that statute's plain meaning." *Id.* at 26.

As the D.C. Circuit has explained, the legislative history shows that § 515 "was added to ERISA to simplify litigation, not to expand the universe of potential defendants." *Kracher*, 856 F.2d at 1549. The purpose of § 515 was to "ensure that courts do not permit contractually obligated defendants to obstruct garden-variety collection actions by alleging defenses unrelated to the contractual commitments to make benefit payments." *Mason Tenders Dist. Council Welfare Fund v. Dalton*, 648 F. Supp. 1309, 1312 (S.D.N.Y. 1986) (decision for corporate officer vacated pursuant to settlement); *see also Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982). None of the defenses criticized in the legislative history have anything to do with the

settled principle standing in the Funds' way here: that a corporate officer who was not a party to the contract cannot be personally liable for his corporation's contractual obligations. *See Dalton*, 648 F. Supp. at 1312. Thus, far from supporting the Funds' attempt to avoid the plain language of the statute, the legislative history positively squelches that attempt.

D. Section 515 Was Not Intended To Revoke The Long Established Principle Of Limited Corporate Liability.

Fourth, the Funds attempt to escape the long established principle of limited corporate liability by arguing that nothing in ERISA exculpates individuals from liability. (Petn. 8-9). This argument confuses the exception with the rule. As several courts of appeal have pointed out, limited liability is a cornerstone of corporate law. *E.g.*, *Kracher*, 856 F.2d at 1550. Thus, "surely if Congress had decided to alter such a universal and time honored concept, it would have signalled that resolve somehow in the legislative history." *Id.* Here, no such signal can be found, either in the statute or the legislative history.

There are, of course, well-established limits on the principle of limited liability. When individuals misuse the corporate form, the corporate veil can be pierced or an alter ego claim can be stated. *Cf. Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1221 (2d Cir. 1987) (piercing the corporate veil on traditional grounds); *Alman v. Danin*, 801 F.2d 1, 3-4 (1st Cir. 1986) (same). However, as the court of appeals noted, the Funds conceded that there were no grounds for piercing Rob Roy's corporate veil. (App. 4a). There being nothing improper about the Niedrichs' use of the limited liability defense, there is no reason to disregard it.

E. Any Similarities To The FLSA Cannot Void § 515's Requirement Of A Contractual Obligation.

Fifth, the Funds argue that because the FLSA's definition of "employer" is similar to that used in ERISA, case law interpreting the FLSA provision automatically governs the ERISA provision. (Petn. 8-9). As the court of appeals correctly held, however, inferences based upon a few words imported from the FLSA cannot undo a consistent interpretation of § 515 reached by every circuit to consider the issue as well as the PBGC. (App. 9a). Several reasons noted by other courts also serve to reject this argument.

First, as the district court correctly observed, § 515 has no parallel provision in the FLSA—no FLSA provision requires that employers already be "obligated" to pay a minimum wage. (App. 7c).

Second, as the First Circuit has explained, even if the definition of employer in § 1002(5) were broader, recognizing § 515's plain requirement of a contractual obligation does not render § 1002(5) a nullity, because any expanded definition of employer in that provision would still make a difference in other ERISA provisions. *Starrett*, 845 F.2d at 25-26.

Third, as several courts of appeal have concluded, the analogy to the FLSA is erroneous for an even more basic reason: the purpose of each statute is fundamentally different. *E.g.*, *Kracher*, 856 F.2d at 1549; *cf. Starrett*, 845 F.2d at 26. Whether viewed from the perspective of the employer or the employee, each statute imposes different obligations and creates different rights and different levels of economic power to enforce those rights.

From the employer's perspective, its obligations under the two statutes are quite different. The FLSA requires

the employer to pay a specified minimum wage and overtime compensation. ERISA, by contrast, does not require the employer to provide a pension plan or even to contribute to one. Instead, the obligation to provide pensions is voluntary, springing from privately made contracts found in collective bargaining agreements. *Kracher*, 856 F.2d at 1549. Because employers are not bound to participate in a plan, exposing officers and shareholders to personal liability may lead to a result never intended by Congress—a refusal to participate in multiemployer plans. *Rockney*, 877 F.2d at 642-43.

The perspective of the worker is also quite different. The Funds argue that ERISA should be treated like the FLSA because both statutes aim to protect workers by securing the payments due to them. (Petn. 9). However, unlike a worker seeking to protect his or her right to a minimum wage, a worker seeking to protect pension and benefit rights does not stand alone. Benefit funds, which typically identify closely with the unions that negotiate collective bargaining agreements on the funds' behalf, have far more power to protect themselves than do individual workers, including the power to secure a written promise of personal liability from the owner of a shaky corporation. *See Starrett*, 845 F.2d at 26.

Given these basic differences between ERISA and the FLSA, there is no reason to disturb the decisions by seven court of appeals that § 515 does not apply to persons like the Niedrichs.

F. Public Policy Supports The Position Of The Courts Of Appeal.

Sixth, having found no support in the statutory language or the legislative history, the Funds turn to their own

view of public policy, and argue that the unanimous position of the courts of appeal imperils the private pension system, the PBGC, and even the Social Security system. (Petn. 16-17). As the First Circuit correctly observed, this argument should be addressed to Congress, not this Court. *Starrett*, 845 F.2d at 26. But even if this argument is considered, it conflicts with economic reality.

Section 515 was added to ERISA by the Multiemployer Pension Plan Amendments Act ("MPPAA"), which reflects a balance between a short term strategy of imposing burdens on current employer contributors and a long term strategy of encouraging new employers to participate in multiemployer pension funds. *DeBreceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877, 880 (1st Cir. 1987) (declining to hold that "employer" includes controlling shareholders and officers for purposes of MPPAA withdrawal liability), *cert. denied*, 484 U.S. 1024 (1988). Imposing personal liability for delinquent payments would hurt that long term strategy by discouraging controlling individuals from directing their corporations to participate in multiemployer pension plans. *Cf. id.* Few individuals will be willing to participate in multiemployer plans if the cost may mean full individual liability, including loss of their homes and life savings.

Finally, if the Funds are truly concerned that the lack of automatic personal liability in the statute will cause the drastic consequences depicted by the Funds (Petn. 16-17), the Funds can demand personal guarantees from corporate officers with control over pension contributions. *Cf. Levit*, 874 F.2d at 1193; *Starrett*, 845 F.2d at 26. Accordingly, public policy reasons provide scant support for rejecting the plain language of the statute. Given the agreement by seven courts of appeal, there is no reason to grant this petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL R. MURRAY
Counsel of Record
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Attorney for Respondents

Of Counsel:

JOHN J. DUNBAR
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Dated: April 16, 1990

Supreme Court, U.S.
FILED
APR 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1456

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., AND THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH AND DENISE NIEDRICH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

PAUL VICTOR ESPOSITO
135 South LaSalle Street
Suite 1000
Chicago, Illinois 60603-4274
(312) 580-1250

Counsel for Petitioners.

April 20, 1990

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a controlling officer or shareholder may be held personally liable under ERISA for a corporation's delinquent contributions to a multiemployer benefit plan where neither the corporate veil can be pierced nor an alter ego established.

LIST OF PARTIES

All parties to the proceeding in the court of appeals are listed in the caption of this Petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
REASONS FOR GRANTING THE WRIT	1
The Decision Raises An Important Question Regarding The Funding Of Multiemployer Benefit Plans Under ERISA	1
CONCLUSION	5

TABLE OF AUTHORITIES

CASES: Page

Falk v. *Brennan*, 414 U.S. 190 (1973) 4

Laborers' Health and Welfare Trust Fund for Northern California v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988) 3

Leddy v. *Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989) 2

Levit v. *Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989) 4

Massachusetts Laborers' Health & Welfare Fund v. *Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988) 2

STATUTES:

29 U.S.C. § 203(d) 4

29 U.S.C. § 206(a) 3

29 U.S.C. § 207(a)(1) 3

29 U.S.C. § 1002(5) 4

29 U.S.C. § 1145 ..... 2, 3, 4

MISCELLANEOUS:

Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration (Comm. Print 1980) 3

No. 89-1456

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., AND THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH AND DENISE NIEDRICH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

REASONS FOR GRANTING THE WRIT

The Decision Below Raises An Important Question Regarding The Funding Of Multiemployer Benefit Plans Under ERISA.

A controlling officer or shareholder may be found personally liable as an employer under ERISA for a corporation's delinquent contributions to a multiemployer plan where

neither the corporate veil can be pierced nor an alter ego established.

Respondents' implication that petitioners have waived an argument regarding the purpose of the word "obligated" in § 515 is incorrect (Resp. 7). Petitioners' argument was part of their consistently stated position that § 515 imposes personal liability. The seventh circuit's failure to address the argument does not mean that petitioners waived it.

Furthermore, *Massachusetts Laborers Health & Welfare Fund* v. *Starrett Paving Corp.*. 845 F.2d 23 (1st Cir. 1988), did not address the statutory construction argument raised in this case (Resp. 7). In *Starrett,* the court addressed plaintiffs' argument that the word "obligated" merely describes an employer, but does not limit the applicable class of employers. *Id.* at 26. By contrast, petitioners here argue that the word "obligated" was only designed to limit the applicable class of benefit plans to multiemployer plans.

Respondents try to soften the impact of *Leddy* v. *Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989), by referring to the court's mention of "alter ego" corporations and the traditional exceptions to the rule of limited corporate liability (Resp. 6). In *Leddy*, there was insufficient evidence to pierce the corporate veil under traditional principles. *Id.* at 387. However, the court held that under ERISA, personal liability for delinquent corporate contributions may be imposed on a controlling shareholder or officer guilty of fraud, a result required by ERISA's purpose of promoting the interests of employees and beneficiaries in plans and of protecting benefits. *Id.* at 388. That same purpose requires the imposition of personal liability even when a delinquency is not caused by fraud. Thus, the *Leddy* rationale reveals a serious flaw in the other circuit decisions.

Respondents misread *Laborers' Health and Welfare Trust Fund for Northern California* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988) (Resp. 7). First, *Advanced Lightweight Concrete* is not a withdrawal liability case. *Id.* at 545 n. 10. Second, the case did not address a position similar to petitioners' position here. Unquestionably, this Court ruled that under § 515, the obligation to contribute must arise out of a contract. *Id.* at 549-50 n. 16. However, the Court was not faced with the question of whether a controlling corporate officer or shareholder may be liable for a corporation's delinquent contractual contributions. Thus, although *Advanced Lightweight Concrete* is important, it does not answer the question here.

Actually, this case presents a significant variation on the *Advanced Lightweight Concrete* theme. There, the funds sought contributions under § 515 from a traditional employer, a corporation, but for a period following the expiration of a collective bargaining agreement which had given rise to the duty to contribute. *Id.* at 541, 542. Here, petitioners seek delinquent contributions under § 515 for periods during the pendency of collective bargaining agreements, but from non-traditional employers—controlling officers. Consequently, the resolution of this case will further flesh out the meaning of § 515.

Respondents incorrectly argue that § 515 does not have a counterpart in the Fair Labor Standards Act (FLSA) (Resp. 12). Section 515 codifies the obligation to contribute to plans. Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980). Likewise, FLSA codifies the duty to pay a minimum wage and overtime compensation. 29 U.S.C. §§ 206(a), 207(a)(1). Notably, under FLSA, an "employer" is only obligated to pay "*his*

employees" the required amounts—statutory language which at first blush might protect a controlling officer or shareholder from liability as an "employer." *Id.* (emphasis supplied). However, through the FLSA definition of "employer," this Court and the circuits have imposed liability on non-traditional employers. 29 U.S.C. § 203(d); *Falk* v. *Brennan*, 414 U.S. 190, 195 (1973); *Levit* v. *Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1193 (7th Cir. 1989). Similarly, since ERISA contains a substantially identical definition of "employer", the word "obligated" in § 515 of ERISA does not reduce the applicable class of employers. 29 U.S.C. § 1002(5).

As respondents must concede, Congress did not expressly state whether the FLSA interpretation, with its modification of the rule of limited corporate liability, applied to ERISA (Resp. 11). Congress' silence makes this case attractive—and important—for review. By rejecting personal liability in the absence of an express statement from Congress, the circuits have jeopardized the rights of millions of workers and their families to benefits which they have earned. Given this drastic consequence, this Court should determine the Congressional intent.

The unanimity of circuit results should not deter plenary review because in strictly construing ERISA, the circuits have subverted its purpose. Indeed, the unanimity of the circuits only serves to tie the hands of affected districts and endanger plans and benefits nationwide. Supreme Court review is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL VICTOR ESPOSITO
135 South LaSalle Street
Suite 1000
Chicago, Illinois 60603-4274
(312) 580-1250

Counsel for Petitioners.

Supreme Court, U.S.
FILED
APR 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1456

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., and THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH and DENISE NIEDRICH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF THE PETITIONERS

GERALD M. FEDER
DAVID R. LEVIN *
MARY J. RIESER
FEDER & ASSOCIATES
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

* (Counsel of Record)

Dated: April 13, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE NATIONAL COORDINATING COMMITEEE FOR MULTIEMPLOYER PLANS	2
REASONS FOR REVIEW	4
CONCLUSION	13

TABLE OF AUTHORITIES

CASES Page

Alman v. Danin, 801 F.2d 1 (1st Cir. 1986) 10, 12
Blatt v. Marshall and Lassman, 812 F.2d 810 (2d Cir. 1987) 9
Capital Tel. Co. v. FCC, 498 F.2d 734 (D.C. 1974) 10
Central States, Southeast and Southwest Area Pension Fund v. Alco Express Co., 522 F. Supp. 919 (E.D. Mich. 1981) 6
Central States, Southeast and Southwest Area Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985) 6
Central States, Southeast and Southwest Area Pension Fund v. Hitchings Trucking, Inc., 472 F. Supp. 1243 (E.D. Mich. 1979) 11
Central States, Southeast and Southwest Area Pension & Health and Welfare Funds v. McNamara Motor Express, Inc., 503 F. Supp. 96 (W.D. Mich. 1981) 10
Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986) 2
Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912 (2d Cir. 1989) 4
Donovan v. Grim Hotel Co., 747 F.2d 966 (5th Cir. 1984) 13
Donovan v. Sabine Irrigation Co. Inc., 695 F.2d 190 (5th Cir. 1983) 13
Falk v. Brennan, 414 U.S. 190 (1973) 12, 13
Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629 (W.D. Wis. 1979) 9
Goldberg v. Whitaker House Coop. Inc., 366 U.S. 28 (1961) 12, 13
Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983) 6, 14
International Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988) 9
Laborers' Fringe Benefit Fund—Detroit and Vicinity v. Northwest Concrete & Constr., Inc., 640 F.2d 1350 (6th Cir. 1981) 5, 8, 10
Leddy v. Standard Drywall, Inc., 875 F.2d 383 (2d Cir. 1989) 4, 8, 9

TABLE OF AUTHORITIES—Continued

Page

Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989) 7, 8, 11
Local 445 Welfare Fund v. Wein, 855 F.2d 62 (2d Cir. 1988) 9
Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23 (1st Cir. 1988) 9
Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 14
National Stabilization Agreement of Sheet Metal Indus. Trust Fund v. Commercial Roofing & Sheet Metal, 655 F.2d 1218 (D.C. Cir. 1981) 5
NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 6
NLRB v. Hearst Publications, 322 U.S. 111 (1944) 12
Painters Pension Fund v. Hartline-Thomas, Inc., 4 Employee Benefits Cas. (BNA) 1199 (D.D.C. 1983) 10
Pension Benefit Guaranty Corp. v. Greene, 570 F. Supp. 1483 (W.D. Pa. 1983) 9
Pension Benefit Guaranty Corp. v. Solomsen, 671 F. Supp. 938 (E.D. N.Y. 1987) 9
Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989) 8
Scarbrough v. Perez, 870 F.2d 1079 (6th Cir. 1989) 5
Solomon v. Klein, 770 F.2d 352 (3rd Cir. 1985) 9
South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940) 14
Taylor v. Standard Gas Co., 306 U.S. 307 (1939) 10
United States v. Hansen, 722 F.2d 940 (D.C. Cir. 1984) 6
United States v. S & Vee Cartage Co., 704 F.2d 914 (6th Cir. 1983) 10
West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Co., 685 F. Supp. 953 (D. W.Va. 1988) 8, 9

TABLE OF AUTHORITIES—Continued

STATUTES Page

The Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208 (1980) 2, 5
26 U.S.C. § 412 4
29 U.S.C. § 186(c)(5) 4, 8
29 U.S.C. § 203(d) 11
29 U.S.C. § 206(a) 11, 12, 13
29 U.S.C. § 207(a)(1) 12
29 U.S.C. § 216(b) 12
29 U.S.C. § 1001 3
29 U.S.C. § 1001a 3, 4, 10
29 U.S.C. § 1001(a) 10
29 U.S.C. § 1001(b) 4, 5
29 U.S.C. § 1002(5) 7
29 U.S.C. § 1082 4
29 U.S.C. § 1104 4
29 U.S.C. § 1106 4
29 U.S.C. § 1132 9
29 U.S.C. § 1132(a) 8
29 U.S.C. § 1132(g)(2) 4, 6
29 U.S.C. § 1145 .... 4, 6, 8, 10

LEGISLATIVE MATERIALS

126 Cong. Rec. S9835 (daily ed. July 24, 1980) 2
126 Cong. Rec. S10100 (daily ed. July 29, 1980) 2
126 Cong. Rec. 23,288 (1980) 7
H. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980) 6

ADMINISTRATIVE MATERIALS

29 C.F.R. § 778.108-778.110 (1987) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1456

PLUMBERS' PENSION FUND, LOCAL 130, U.A., PLUMBERS' WELFARE FUND, LOCAL 130, U.A., and THE TRUST FUND FOR APPRENTICE AND JOURNEYMAN EDUCATION AND TRAINING, LOCAL 130, U.A.,

Petitioners,

v.

ROBERT NIEDRICH and DENISE NIEDRICH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF THE PETITIONERS

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") submits this brief *amicus curiae* to urge the Court to review the decision below that a dominant corporate officer or owner cannot be personally liable for delinquent contributions to an employee benefit fund under Title I of the Employee Retirement Income Security Act ("ERISA"), absent a piercing of the corporate veil or proof of alter ego status.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The NCCMP is a nonprofit, tax-exempt organization formed after the enactment of ERISA to represent the interests of multiemployer pension and welfare plans and their participants in the development of employee benefit legislation and government regulations under ERISA and other laws. Petitioners and Respondents have consented to the filing of this brief.

The NCCMP has been recognized as having had a "significant impact" on the development of the Multiemployer Pension Plan Amendments Act of 1980 * by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed. July 24, 1980); 126 Cong. Rec. S10100 (daily ed. July 29, 1980). The NCCMP's participation as an *amicus curiae* has been acknowledged by this Court. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 215 n.1 (1986).

More than 190 multiemployer plans and related international unions are members of the NCCMP. These plans are fairly representative of all the nation's multiemployer plans, covering more than nine million workers and their families. An acknowledged characteristic of multiemployer plans is that many of their participating employers have far less than 100 employees. In many cases, these employers are closely-held corporations in which the owner/operators, as a matter of economic reality, make all the decisions for the corporation and are involved in the day-to-day operations, including the decision whether to make timely benefit plan contributions.

A number of industries (*e.g.*, federal service contracts, building and construction) covered by multiemployer plans are characterized by highly mobile employers—employers that can easily go in and out of business and

---

* Pub. L. 96-364, 94 Stat. 1208-1311 (1980).

change identity. These employers typically own little or no real estate or equipment, and they are thinly capitalized. Any judicial decision that erodes the plans' ability to collect contributions from such employers erodes the financial stability of multiemployer plans.

Because of the broad range of experience of the NCCMP's constituency and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to provide the Court with insight concerning the practical, negative implications of the decision below for multiemployer plans and to state the position of trustees, participants and beneficiaries of such plans.

By enacting ERISA, Congress sought to enhance the financial stability of multiemployer plans and to foster the maintenance and growth of such plans. 29 U.S.C. § 1001. The legislative history of ERISA—both as enacted in 1974 and as amended in 1980—confirms the importance of ready and direct access to the federal courts to collect contributions. Ensuring the funding of multiemployer plan benefits through timely payment of employer contributions is one of the statute's principal objectives. *See id.*; 29 U.S.C. § 1001a. The decision below is contrary to these Congressional goals.

As set forth herein, the NCCMP submits that the decision below undermines the national employee benefits policy established by Congress. Affirmance of the decision below would have a significant adverse impact on the financial stability of the nation's multiemployer pension and welfare plans, the benefit security of more than nine million plan participants and their families, and the federal program that insures certain of these benefits.

The necessary predicate to maintaining the legally mandated financial integrity of multiemployer pension and welfare benefit plans is the implementation of an

ongoing system to collect employer contributions. The inability to collect these contributions can lead to inadequate funding of the multiemployer plans involved.

The impact of the decision below is to force multiemployer pension plans to provide benefits for services rendered, while denying these plans their full statutory causes of action to collect the contributions that should have been paid for those services. Similarly, the decision below forces multiemployer welfare benefit plans to cease providing medical and other benefits to employees whose employers have reaped the benefits of their labors but refused to fund the benefits for which the employees labored. Such results are totally at odds with the purposes of ERISA. *See, e.g.*, 29 U.S.C. §§ 1001(b), 1001a.

REASONS FOR REVIEW

A.

The purpose of multiemployer benefit plans and the policy underlying the statute which regulates these plans are one and the same: to protect the interests of plan participants and to ensure the receipt of promised benefits. *See* 29 U.S.C. §§ 186(c)(5), 1001(b). The assets of multiemployer benefit plans consist initially of employer contributions, which trustees have a statutory duty to try to collect. *See* 26 U.S.C. § 412; 29 U.S.C. §§ 1082, 1104, 1106, 1132(g)(2), 1145. *See also Diduck v. Kaszycki & Sons Contractors*, 874 F.2d 912 (2d Cir. 1989) (holding trustees of multiemployer plan breached fiduciary duty by failing to try to collect delinquent contributions).

ERISA, was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans and to protect contractually defined benefits." *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989) (holding corporate officer personally liable under ERISA for delinquent contributions to extent he conspired to

divert contributions from the plan). To implement this policy, ERISA "provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts," 29 U.S.C. § 1001(b).

ERISA, as enacted in 1974, provided a cause of action for multiemployer plan trustees to collect delinquent contributions. *See, e.g., National Stabilization Agreement of Sheet Metal Indus. Trust Fund v. Commercial Roofing & Sheet Metal*, 655 F.2d 1218, 1219-20 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). Moreover, ERISA, as enacted in 1974, provided a basis for holding a dominant corporate owner/officer personally liable for payment of delinquent contributions, without resort to judicial corporate veil-piercing, *Laborers' Fringe Benefit Fund—Detroit and Vicinity v. Northwest Concrete & Constr., Inc.*, 640 F.2d 1350, 1352-53 (6th Cir. 1981). In *Northwest Concrete*, the Sixth Circuit reversed the district court's refusal to enjoin the corporation and the individual from future failures to contribute; the district court's judgments against the owner/officer personally and against his corporation were not challenged on appeal. In fact, the Sixth Circuit opinion states that the owner/officer had been ordered to pay delinquent contributions in other cases, too. *Id.*, 640 F.2d at 1353 n.4.[1]

In 1980, ERISA was amended.[2] These amendments were prompted by Congressional anxiety about the finan-

---

[1] In the recent case of *Scarbrough v. Perez*, 870 F.2d 1079 (6th Cir. 1989), the court refused to find a sole shareholder of an employer's corporate parent liable for contributions under ERISA Section 515. *Ipse dixit*, the Sixth Circuit held that *Perez* was not inconsistent with its earlier ruling under ERISA Section 502 in *Northwest Concrete*.

[2] The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, 94 Stat. 1208-1311 (1980). Although *Northwest Concrete* and *Commercial Roofing* were finally decided after ERISA was amended, both cases were brought and decided under the provisions of ERISA as enacted in 1974. The NCCMP

cial stability of multiemployer plans and concerns that the maintenance and growth of such plans were being discouraged. *See generally* Report of the House of Representatives Committee on Education and Labor on H.R. 3904, H. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980). Nowhere in these amendments is there an express repeal of the aforementioned ERISA cause of action to collect delinquencies from corporations and their dominant owner/officers. And, "it is a venerable rule, frequently reaffirmed by the Supreme Court that repeals by implication are not favored and will not be found unless an intent to repeal is 'clear and manifest.'" *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1984) (citations omitted).

The 1980 amendments were designed, *inter alia*, "to strengthen the funding requirements and enhance the financial stability of multiemployer . . . plans," *NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981), by assuring that trustees will have the ability to recover delinquent contributions quickly and effectively. *Accord Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); 29 U.S.C. §§ 1132(g)(2), 1145.

The drafters of the 1980 amendments to ERISA expressly focused on five judicial decisions:

> In this regard we endorse judicial decisions such as *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge v. Long's Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978). Cases such as *Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, —— F.

---

was an active participant in the fashioning of ERISA remedies for delinquent contributions. *See Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co.*, 522 F. Supp. 919, 926 n.8 (E.D. Mich. 1981).

> Supp. ——, 103 LRRM 2219 (W.D. Wash. 1979) and *Washington Area Carpenters Welfare Fund, et al. v. Overhead Door Company*, C.A. No. 79-0097 (USDC D.C., April 22, 1980) are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

126 Cong. Rec. 23,288 (1980) (statement of Sens. Williams and Javits). One of the cases cited by the Congressional drafters—*Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*—involved the personal liability of an owner/officer for delinquent contributions.[3]

The Seventh Circuit, without reference to the foregoing caselaw, concluded that a corporate officer or manager may come within ERISA's broad definition of "employer," 29 U.S.C. § 1002(5) and still not be liable for contributions. Rather, in affirming the district court's decision in the instant case, the Seventh Circuit relied on *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989). "Only an 'employer *who is obligated to make contributions to*' a plan under an agreement need do so. Such an employer must make contributions 'in accordance with the terms and conditions of such plan or such agreement.' Even if a manager or other officer is an 'employer' under ERISA § 3(5), the plan or other agreement still governs what each must do, for not all 'employers' are 'obligated to make contributions' under the 'terms and conditions' of a plan or agreement." *Levit*, 874 F.2d at 1193 (emphasis in original).

---

[3] It is unclear from the *McDowell* opinion whether the owner/officer's business were incorporated. The district court's decision, denying the multiemployer fund its sought-after relief, was "considered to be incorrectly decided" by the drafters of the 1980 Amendments to ERISA. The decision of the district court was eventually reversed, 673 F.2d 1341 (9th Cir. 1982).

The Seventh Circuit's interpretation of ERISA Section 515, 29 U.S.C. § 1145 is at odds with the pre-MPPAA decisions enforcing the obligation to contribute against owner/officers, as in *Northwest Concrete*, under ERISA Section 502, 29 U.S.C. § 1132(a). For, Section 502 does not contain the language that the Seventh Circuit found to be controlling, *i.e.*, "employer *who is obligated to make contributions*," ERISA Section 515 (emphasis supplied).

Instead, Section 502 permits trustees to sue any employer to prevent violations of ERISA and to enforce the obligation to contribute. And, "[s]urely, the intentional evasion of responsibility for employee pensions violates ERISA; otherwise, it becomes a social cost for which we all must pay." *Rockney v. Blohorn*, 877 F.2d 637, 644 n.1 (8th Cir. 1989) (Heaney, J., dissenting). Nothing in ERISA Section 502 requires that the liable employer actually be the signatory to the collective bargaining agreement.

It defies logic and reason to conclude that by adding Section 515 to ERISA in 1980 to enhance collection efforts, Congress intended to create an enforcement mechanism that was more restrictive than the extant provision of ERISA. Rather, the reference to the obligation to make contributions in ERISA Section 515 is a recognition of the statutory prerequisites of Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5).

C.

The Seventh Circuit's decision in *Levit* and the instant case conflict with the recent decisions in *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989) and *West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Co.*, 685 F. Supp. 953 (D. W.Va. 1988).[4]

---

[4] The D.C., First and, Third Circuits have refused to find corporate owner/officers liable as "employers," under ERISA Section

The Second Circuit in *Leddy* held a corporate official "individually liable under Section 502 of ERISA, 29 U.S.C. § 1132, just as he would be liable for unpaid minimum wages under FLSA, even if the traditional conditions for piercing the corporate veil are not met" under circumstances where the corporate officer "defrauds or conspires to defraud a benefit fund of required contributions" and thereby "deliberately flouts ERISA obligations." *Leddy*, 875 F.2d at 388. *See Local 445 Welfare Fund v. Wein*, 855 F.2d 62 (2d Cir. 1988) (affirming order holding corporate owner/officers liable for delinquent contributions under New York debtor/creditor law and awarding attorney fees under ERISA).

In *Ball Electric*, the court held the controlling corporate officer liable for unpaid contributions to an employee benefit fund under ERISA, without piercing the corporate veil. The court held that "while a corporate officer may not be an employer in the traditional sense, he may be one in statutory terms," 685 F. Supp. at 955.

The federal courts have had no difficulty in finding corporate officers liable under ERISA for fiduciary breaches, including fiduciary breaches for the failure to make contributions to employee benefit plans. *Pension Benefit Guaranty Corp. v. Solomsen*, 671 F. Supp. 938 (E.D. N.Y. 1987); *Pension Benefit Guaranty Corp. v. Greene*, 570 F. Supp. 1483, 1495-96, 1499-500 (W.D. Pa. 1983), *aff'd*, 727 F.2d 1100 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984). *See also Blatt v. Marshall and Lassman*, 812 F.2d 810 (2d Cir. 1987); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 641 (W.D. Wis. 1979). And, the liability imposed in these cases is personal liability.

---

515. *International Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc.*, 856 F.2d 1546 (D.C. Cir. 1988); *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988); *Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985).

Similarly, a controlling corporate officer who makes false statements in a contribution report to reduce the corporation's obligation to contribute can be fined or jailed. *United States v. S. & Vee Cartage Co.*, 704 F.2d 914 (6th Cir.), *cert. denied*, 464 U.S. 935 (1983). But, according to the decision below, that corporate officer could not be required to pay the corresponding delinquent contributions in a civil suit under ERISA Section 515.

Since long before the enactment of ERISA, the judiciary has acknowledged "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939). *See Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986); *Capital Tel. Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) and cases cited therein. And, regarding the personal liability of corporate owner/officers under ERISA, ERISA "cannot be said to attach great weight to corporate form." *Danin*, 801 F.2d at 2.

National employee benefits policy underscores that "the continued well-being and security of millions of employees, retirees and their dependents are directly affected by multiemployer pension plans," 29 U.S.C. § 1001a. Therefore, the Congress has not only endeavored to foster employee benefit plan continuation and growth, but it has also established "that minimum standards be provided assuring the financial soundness" of these plans, 29 U.S.C. § 1001(a).

Contributions are the life-blood of employee benefit plans. Consequently, the failure to make contributions constitutes irreparable harm to plans. *See Northwest Concrete*, 640 F.2d at 1352; *Painters Pension Fund v. Hartline-Thomas, Inc.*, 4 Employee Benefits Cas. (BNA) 1199, 1200 (D.D.C. 1983); *Central States, Southeast and*

Southwest Areas Pension & Health and Welfare Funds v. McNamara Motor Express, Inc., 503 F. Supp. 96, 98-99 (W.D. Mich. 1981); *Central States, Southeast and Southwest Areas Pension Fund v. Hitchings Trucking, Inc.*, 472 F. Supp. 1243, 1247 (E.D. Mich. 1979). When an employer—acting through its dominant owner/officer—is able to avoid paying contributions to welfare benefit plans, plan participants are denied the medical and other benefits for which they labored. For, the plans generally cannot provide benefits that the employer refused to fund.

Trustees are interested in maximizing the collection of delinquent contributions, and thereby ensuring the uninterrupted payment of benefits. So it is that in the many years that the NCCMP has been in existence, not one of the hundreds of plan trustees represented by the NCCMP—trustees appointed by labor and by management—has ever requested that the NCCMP take a position against personal liability of corporate owner/officers. Neither have any of the millions of plan participants and beneficiaries made such a request. For, the imposition of liability on corporate owner/officers enhances, rather than detracts, from the financial stability of multiemployer plans.

D.

The Seventh Circuit acknowledges that ERISA's definition of "employer" is patterned upon the Fair Labor Standards Act ("FLSA") definition. *Levit*, 874 F.2d at 1193. Yet, the Seventh Circuit has ignored the reasoning of the judicial decisions under the FLSA, even though that Act, like ERISA, defines an "employer" as one who acts "directly or indirectly in the interest of an employer. . . ." 29 U.S.C. § 203(d). The FLSA provides *inter alia* that "[e]very employer shall pay [minimum wages] to each of his employees. . . ." 29 U.S.C. § 206(a).

Between the enactment of the FLSA and the enactment of ERISA in 1974, the federal judiciary had numerous opportunities to determine the scope of the term "employer" under the FLSA, which requires that "[e]very employer shall pay to each of his employees . . ." a prescribed minimum wage, 29 U.S.C. § 206(a). Often was it argued that since the corporation—not its owner/officer—has employees, only the corporation has the obligation "to pay" described in the FLSA. Yet, in determining who was an "employer" with an obligation "to pay" under the FLSA—*i.e.*, whether only the corporation or also the owner/officer—this Court has adopted an "economic reality" test. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (recognizing the "expansiveness" of the FLSA definition of "employer"). *See also Falk v. Brennan*, 414 U.S. 190, 195 (1973). *Accord NLRB v. Hearst Publications*, 322 U.S. 111, 129 (1944) (similar definition of "employer" under NLRA "to be determined broadly . . . by underlying economic facts rather than technically and exclusively by previously established legal classifications"). As under ERISA, the liability imposed under the FLSA is for an employer's statutory and contractual obligations. *See* 29 U.S.C. §§ 207(a)(1), 216(b); 29 C.F.R. §§ 778.108-778.110 (1987) (personal liability for wages calculated at time and one-half the regular rate of pay specified in the collective bargaining agreement).

ERISA, like the FLSA, is an integral component of national labor policy. While the FLSA guarantees a minimum wage to employees, ERISA guarantees that earned fringe benefits will not be lost. It is essential that national labor policy be consistent in protecting the earnings of employees. After an employee has put in a day's work he or she is entitled to a day's pay. The corporate form should not be permitted to "defeat overriding federal legislative policies." *Danin*, 801 F.2d at 3.

The analysis under the FLSA has focused on "the totality of the circumstances, underscoring the economic realities of the workers' employment." *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 194 (5th Cir.), *cert. denied*, 463 U.S. 1207 (1983). "[I]t is incumbent upon the courts to transcend traditional concepts of the employer-employee relationship and assess the economic realities presented by the facts of each case." *Id.*, 695 F.2d at 195, *citing Goldberg v. Whitaker House Coop. Inc.*, 366 U.S. 28 (1961).

The Seventh Circuit points to the fact that nothing in the legislative history of ERISA indicates a Congressional intent to hold corporate officers liable for the contributions that they decide to make or keep. Yet, nothing in the legislative history of the FLSA indicated any such intent, either. Nonetheless, "[t]he Supreme Court has termed [the FLSA's] employer definition 'expansive' and has held that 'managerial responsibilities' and 'substantial control of the terms and conditions of the [employer's] work' create statutory employer status." *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 971 (5th Cir. 1984) (*quoting Falk v. Brennan*, 414 U.S. 190, 195 (1973)).

Yet, the Seventh Circuit in the instant case, honoring form over substance, refused to hold an individual personally liable under ERISA for failure to make contributions to a multiemployer plan, even though this selfsame individual satisfies the court—fashioned FLSA economic reality test, under which he would be liable as the "employer" with the obligation to "pay," 29 U.S.C. § 206(a).

CONCLUSION

To hold that dominant corporate owner/officers can escape liability for delinquent contributions, notwithstanding the broad scope of the ERISA definition of "employer," undermines "ERISA's interlocking, interrelated and interdependent remedial scheme, which is

. . . part of a 'comprehensive and reticulated statute.'" *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). For, "[h]aving heard the music, he must pay the piper." *Jim McNeff, Inc. v. Todd*, 461 U.S. at 260, 271 (1983).

For the foregoing reasons and in recognition that ERISA, too, "must be read in the light of the mischief to be corrected and the end to be attained," *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940), the NCCMP respectfully urges this Court to review the decision of the court below.

Respectfully submitted,

GERALD M. FEDER
DAVID R. LEVIN *
MARY J. RIESER
FEDER & ASSOCIATES
1350 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8305
Attorneys for National Coordinating Committee for Multiemployer Plans

Dated: April 13, 1990

* (Counsel of Record)